SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 376.

JOHN E. KINNANE, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF MICHIGAN, APPELLANT,

vs.

DETROIT CREAMERY COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

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1 *Bill of complaint.*

United States of America. In the District Court of the United States for the Eastern District of Michigan, Southern Division, in equity.

To the District Court of the United States for the Eastern District of Michigan, Southern Division, in equity:

Belle Isle-East Side Creamery Company, a Michigan corporation; Detroit Creamery Company, a Michigan corporation; State Creamery Company, a Michigan corporation; John Schlaff Creamery Company, a Michigan corporation; Towar's Wayne County Creamery, a Michigan corporation; and J. H. Wilson & Sons Creamery Company, a Michigan corporation, file this bill of complaint against John E. Kinnane, William F. Connolly, Fred H. Diehl, William Brogan, Frances E. Burns, C. A. Clark, W. J. Cusick, and A. E. Sarvis, as defendants, and show unto this honorable court:

First. That each of the corporations aforesaid named is organized and existing under the laws of the State of Michigan, has its principal headquarters and place of business at Detroit, Michigan, and is within the statutes governing and defining the jurisdiction of this court, is a citizen of the United States and a resident of the Eastern District thereof, Southern Division; that each of the defendants above named is a citizen of the United States and a resident of the State of Michigan and of the Eastern District thereof, Southern Division.

Second. Each of the plaintiffs is engaged and has for a long time been engaged in the business of purchasing milk from producers thereof and preparing the same for the market and for resale distribution to the consumers thereof within the city of Detroit and adjacent territory; that each of the plaintiffs has an investment in its business of upwards of $100,000; that the purchase of milk, its preparation and distribution to the ultimate consumer at retail is an important, vital, and essential part of its business.

2 Third. The price of milk for the past several years in Detroit has been established between the producers and distributors by the Detroit milk commission, a body composed of men who, by reason of continuing investigation and contact with the conditions properly entering into a reasonable price for the retail and wholesale sale of milk, have become practical experts. Under the price schedule fixed from to time by such commission the rights of the producers and distributors on the one hand, and of the public on the other have been duly protected and safeguarded, and the price of milk per quart, for sale at retail to the public was, until the illegal and unlawful action of the defendants as hereinafter stated, prescribed for the month of March, 1920, at 16¢ per quart, based on the price to the producer of $4.05 per hundred for milk.

Fourth. The defendants, other than John E. Kinnane, claim and assert that they, collectively, compose a board or body designated as

"Federal Fair Price Commission," and as the plaintiffs and each of them are given to understand by inquiry, their asserted and claimed authority is solely founded and rested upon certain statutes of the United States commonly called and designated as the "Lever Act" to which reference is made in this bill of complaint, particularly to section 2, the amended act being entitled, "An act to amend an act entitled 'An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' approved August 10, 1917, and to regulate rents in the District of Columbia."

Fifth. On information and belief the plaintiffs and each of them allege that the said defendants so claiming to constitute the Federal Fair Price Commission were not legally appointed and do not legally hold any such office and that their actions on that account are void and of no effect.

3 Sixth. The plaintiffs and each of them aver and charge that recently on or about April 6, 1920, the said defendants, other than the said Kinnane, in their claimed and asserted capacities as members of the said Federal Fair Price Commission, fixed and prescribed a schedule for the sale of milk at retail to commence on April 15, 1920, at 14¢ per quart and 8¢ per pint, and at 13¢ per quart and 7¢ per pint wholesale.

Seventh. In point of fact, plaintiffs are advised and charge jointly and severally that the personnel of said commission, as aforesaid stated, were selected by the defendant, John E. Kinnane, either directly or indirectly.

Eighth. The defendant John E. Kinnane occupies a position of district attorney of the United States for the eastern district of Michigan. In that capacity the defendant is charged with the duty of enforcing the valid laws and statutes of the United States of America. The said defendant has given out publicly through the press as well as otherwise that he, being United States district attorney, will cause to be prosecuted any person such as the plaintiffs and each of them who fails to comply with and to obey the price schedule fixed in manner and form by the defendants; and he has given out that the said act of the said defendants, composing the aforesaid commission, in so limiting the prices for the retail and wholesale distribution and delivery of milk, is valid and binding and supersedes all other regulations, statutory or common law, and that as a result of such action of such commission any other rights of the plaintiffs and each of them to conduct their business as they and each of them had heretofore conducted it, therefore is prohibited and made a penal offense; and that pursuant to section 2 of the so-called Lever Act, above referred to, each and every sale of milk made except at the prices fixed by such commission will constitute a penal offense against the United States and subject each actor to such transaction to the penalty of imprisonment for a period of

not exceeding two years, and further subject such actor to the possibility of fine not exceeding $5,000.

Ninth. The plaintiffs and each of them have built up their respective businesses through a long series of years, and a unique but indispensable part of the conduct and operation of the sale and distribution of milk is that the milk to the consumer is delivered by milk salesmen who take the milk in wagons or other equipages from door to door to the householder or to the ultimate consumer. All of the plaintiffs sell at retail and wholesale each day, in the city of Detroit, upwards of 200,000 quarts; to particularize, the Detroit Creamery Company sells through its milk salesmen, calling at each house, substantially in manner and form above stated, at retail, more than 100,000 quarts per day; Towar's Wayne County Creamery sells approximately 42,000 quarts per day; Bell Isle-East Side Creamery Company sells approximately 38,000 quarts per day; John Schlaff Creamery Company sells approximately 30,000 quarts per day; J. H. Wilson & Sons Creamery Company sells approximately 14,000 quarts; for such distribution there are required the services of upwards of five hundred milk salesmen and each salesman makes on an average not less than two hundred sales at retail to householders and ultimate consumers per day.

Tenth. Plaintiffs allege jointly and severally that the fines capable of being levied or claimed rightfully to be levied on one day's transactions against the milk salesmen would aggregate millions of dollars, and the number of transactions which, if such claims of the defendants are well founded, would justify a sentence of imprisonment, would exceed one hundred thousand.

Eleventh. The plaintiffs have at large expense trained and developed and continue to develop and employ milk salesmen. They have, for the purpose of distribution of milk, purchased and hold for use in carrying on of the retail milk business a large number of vehicles of various kinds, representing in the individual case of each plaintiff an investment of upwards of ten thousand dollars ($10,000).

Twelfth. The plaintiffs aver that by reason of the threats of said defendants to cause any person, including both plaintiffs and their employees to be arrested and charged with violation of the Federal law with the consequent penalty of imprisonment and prohibitive fines, as earlier stated, their said milk salesmen will not continue in their employ and deliver milk at lawful prices, that is to say, at prices above 14¢ per quart and 8¢ per pint, retail, and 13¢ per quart and 7¢ per pint at wholesale, and as a result of the claimed and usurped authority of the defendants the business of each of the plaintiffs will be irreparably injured and destroyed so long as the threats of the defendants continue to exert pressure upon the said plaintiffs and their employees, unless each of the plaintiffs through the unlawful threats and intimidation of the defendants complied with the unlawful and illegal schedule promulgated by them; whereas, plaintiffs aver that each of them has the right to have its business conducted

free from the effects of such schedule so promulgated by the defendants and to have the right to conduct and actually conduct their business respecting the sale and fixing the price of milk at retail and wholesale undisturbed by the defendants.

Thirteenth. Insofar as said act undertakes by the use of the phrase "That it is hereby made unlawful for any person * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries * * *" does not and can not legally constitute or create a crime under the Constitution of the United States and the amendments thereto for the reason that the alleged crime is of necessity expressed in such vague, indefinite and uncertain a manner and without any reasonably certain standard as to be
5 a violation of the rights of citizens of the United States, to which the plaintiffs belong and particularly of the sixth amendment requiring parties to be advised of the nature of the crime or accusation lodged or to be brought against them.

Fourteenth. The threatened criminal prosecution against plaintiffs, each of them and their employees, who proposed to conduct, as they have a right, their business in the respects covered by this bill and to charge a lawful rate for the distribution of milk at retail and wholesale will, under the circumstances, illegally and unlawfully deter and prevent them, and each of them, from carrying on their respective businesses and operate to deprive the plaintiffs, and each of them, of their property, both tangible and intangible, without due process of law and in violation of the Constitution of the United States and amendments thereto, and the plaintiffs, and each of them, show that the subject matter of controversy as applied to each of them exceeds in value the principal sum of $3,000 exclusive of interests or costs and that they found their right to come into this court upon a Federal right, as above stated, arising under the Constitution of the United States and amendments thereto. The enforcement or threat of enforcement of the so-called Federal Fair Price Commission's schedule would involve plaintiffs and each of them in contractual difficulties and litigation over existing contracts for supplying of milk with their respective producers and would lessen to a substantial degree their course of supply of milk, and in this way steadily, progressively, and surely result in the diminuation of, impairment, and appreciable destruction of their established business, constituting property under the Federal Constitution and its amendments. Further, the enforcement or threat of enforcement would subject in form the milk drivers to arrest and imprisonment, require them, in order to regain the liberty to provide bail, and further subject them to the indignity of indictment, each and all of which steps are and would be illegal and void; nevertheless, the threats of the defendants under their claimed au-
7 thority to do the various acts herein complained of will unavoidably cause and has caused such apprehension and fear in the officers and employees of the plaintiffs and each of them as to have

persuaded and coerced them to leave plaintiffs service to the irreparable injury of their said several businesses if the said plaintiffs require such officers and employees to follow and obey such schedule of prices for milk as these plaintiffs aver they and each of them have a right to fix in place and instead of the schedule promulgated by the defendants, and the plaintiffs and each of them further aver that the only way in which they could preserve their respective businesses and hold their employees and officers in line would be to comply with the fiatic promulgation, void and illegal though it be, of the defendants unless the threats and oppressions and attempted enforcement of such schedule in manner and form as herein disclosed be stayed and prevented through the injunctive processes of this court. Further, said plaintiffs aver that they and each of them have subsisting arrangements for their arrangements for their respective continuing supplies of milk from producers, and that when and as such milk comes under their respective possession and control such milk is property which such owner has the right to market without injury or interference by the defendants or any one of them whose pretended authority under color of Federal right—the sole and only source of the defendants' pretended right to control—has no basis other than the so-called Lever Act is, as applied to these plaintiffs and each of them and to the property of each of them, unconstitutional and void.

Fifteenth. The defendants are claiming to act and found their positions under color of Federal right, to wit, the Lever Act aforesaid mentioned. Plaintiffs and each of them aver that the said Federal authority, under color of which the defendants and each of them are engaged in the unlawful conduct to the irreparable injury
8 of the plaintiffs' respective businesses, is void and that therefore the pretended Federal right under which said defendants are so illegally acting affords them no justifications and renders them liable to be sued as defendants to prevent such wrong being inflicted upon each of said plaintiffs and their respective businesses in this court; and that no adequate remedy at law exists in favor of the plaintiffs or any of them, and that this court has sole jurisdiction of the subject matter of the grievance.

Sixteenth. Plaintiffs while not required to make reference thereto as part of this bill of complaint, nevertheless in order to advise the court as to the merits of the controversy—although as already stated the defendants are lacking utterly in authority and power to deal with the subject matter of the grievance at all—charge that the said defendants, other than the said John E. Kinnane, acted capriciously and without affording the plaintiffs and other parties similarly affected any real opportunity to be heard and without any proper examination or investigation into the facts; that the Detroit Milk commission for some years has fixed the price to be paid to the producers of milk and by the consumers, and that the price so fixed by them was 16¢ per quart and 10¢ per pint, at retail. There

is a direct and necessary relation between the price at which milk is to be sold to the public and the price to be paid to the producer; contracts exist between plaintiffs and each of them and producers of milk. If the schedule promulgated by the defendants and threatened to be enforced by the defendant Kinnane should be required to be adhered to and obeyed by the plaintiffs and each of them, and other distributors of milk in Detroit, it would of necessity require the reduction in price to be paid to the producers, and as a necessary consequence, the plaintiffs and each of them are advised by the Milk Producers' Association, which includes substantially all of the producers of milk, that the reduced price which would have to be paid to such producers if milk is to be sold at the schedule promulgated by the defendants would have to be materially
9 reduced, and such reduced price would not represent the actual cost to the producer. The result would be that the necessary supply of milk for Detroit would not be forthcoming. Plaintiffs aver that the price which they proposed to charge—varying as it does in different seasons of the year—is but a fair price, whereas the alleged price fixed by the defendants is a confiscatory one, and that the plaintiffs were denied a proper hearing by said commission. If it should become material, plaintiffs stand ready to prove that the price fixed by the said defendants is confiscatory, and that the difference in price between what is paid to the producer and what is charged to the consumer is an essential and unavoidable cost of handling and properly preparing and delivering the milk to the consumer, and affords only a legitimate, legal, and proper profit to the plaintiffs and each of them.

Seventeenth. Plaintiffs are advised by their counsel that the United States District Court at St. Louis, after a full review of the law and authorities having to do with the section of the Lever Act involved and under which portion alone the defendants claim the source of their right and authority, to be void for the reasons outlined in this bill, that is to say,

(a) Said purported statute is vague and indefinite and uncertain;

(b) Its terms fix no immutable standard of guilt, but leave such standard to the variance of different courts and juries which may be called upon to enforce a decision;

(c) Because said purported statute does not inform such defendants of the nature and cause of the accusation against them.

(d) Because said purported statute does not advise in advance a citizen of the United States as to what acts would constitute a violation thereof;

(e) Because such statute fails utterly to define a crime, but in essence simply declares that any person who shall commit any unjust or unreasonable act shall be deemed guilty of a felony.

10 (f) Because said statute would deprive, if enforced, citizens of their property and liberty without due or any process of law.

Eighteenth. Inasmuch as the plaintiffs and each of them are without any remedy at law or in any other court, they and each of them pray for the following relief:

A. That William F. Connolly, Fred H. Diehl, William Brogan, Frances E. Burns, C. A. Clark, W. J. Cusick, and A. E. Sarvis, claiming to constitute the Federal Fair Price Commission, and John E. Kinnane, personally and in his capacity as United States district attorney, be enjoined temporarily and permanently from enforcing or attempting to enforce the said schedule of rates for the wholesale and retail sale of milk against the plaintiffs or any of them; that the defendants and each of them be enjoined from taking any steps to enforce such mandate or to otherwise interfere with the free conduct of the business of each of the plaintiffs, whether by commencement of criminal proceedings or otherwise.

B. That the defendants and each of them as against the plaintiffs and each of them in respect of the contents of this bill, be prevented from harrassing or oppressing the plaintiffs or any of them or any of their employees, agents, or representatives in the premises; that plaintiffs and each of them obtain such relief general or special as equity in the facts or circumstances warrant.

And plaintiffs will ever pray, etc.,

BELLE ISLE-EAST SIDE CREAMERY COMPANY,
By HENRY LAETHEM, *President.*
Attest:
C. M. HAYBOW, *Secretary.*
DETROIT CREAMERY COMPANY,
By J. H. REMICK, *President.*
F. W. ULRICH, *Secretary.*
STATE CREAMERY COMPANY,
By PETER VLASIC, *President.*
D. N. LINDSAY, *Secretary.*

11

JOHN SCHLAFF CREAMERY COMPANY,
By JOHN SCHLAFF, *President.*
WILLIAM A. SLOAN, *Secretary.*
TOWAR'S WAYNE COUNTY CREAMERY,
By WILLIAM J. KENNEDY, *President.*
HENRY E. GILL, *Secretary.*
J. H. WILSON & SONS CREAMERY COMPANY,
By J. H. WILSON, *President.*
ANNIE WILSON, *Secretary.*

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

On this sixteenth day of April, 1920, personally appeared before me, a notary public, in and for Wayne County, State of Michigan, Henry Latham and A. M. Haybow, who severally made oath and said that they were respectively the president and secretary of Belle

Isle-East Side Creamery Company, a Michigan corporation, that they had signed and executed the said bill of complaint in behalf of said company and they are duly authorized so to do, and that in behalf of said plaintiff they aver that they have read the contents of said bill of complaint and that as to the matters therein stated the same is true in substance and in fact except as to matters stated on information and belief and in respect of such matters the said affiants each for himself believed the same to be true.

KEITH M. HOWELL,
Notary Public, Wayne County, Michigan.

My commission expires February 18, 1924.

12 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

On this sixteenth day of April, 1920, personally appeared before me, a notary public in and for Wayne County, State of Michigan, J. H. Remick and F. W. Ulrich, who severally made oath and said that they were respectively the president and secretary of Detroit Creamery Company, a Michigan corporation, that they had signed and executed the said bill of complaint in behalf of said company and they are duly authorized so to do, and that in behalf of said plaintiff they aver that they have read the contents of said bill of complaint and that as the matters therein stated the same is true in substance and in fact except as to matters stated on information and belief and in respect of such matters the said affiants each for himself believed the same to be true.

KEITH M. HOWELL,
Notary Public, Wayne County, Michigan.

My commission expires February 18, 1924.

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

On this sixteenth day of April, 1920, personally appeared before me, a notary public in and for Wayne County, State of Michigan, Peter Vlasic and D. N. Lindsay, who severally made oath and said that they were respectively the president and secretary of State Creamery Company, a Michigan corporation, that they had signed and executed the said bill of complaint in behalf of said company and they are duly authorized so to do, and that in behalf of said plaintiff they aver that they have read the contents of said bill of complaint and that as to the matters therein stated the same is true in substance and in fact except as to matters stated on information and belief and in respect of such matters the said affiants each for himself believed the same to be true.

KEITH M. HOWELL,
Notary Public, Wayne County, Michigan.

My commission expires February 18, 1924.

13 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

On this sixteenth day of April, 1920, personally appeared before me, a notary public in and for Wayne County, State of Michigan, John Schlaff and William A. Sloan, who severally made oath and said that they were respectively the president and secretary of John Schlaff Creamery Company, a Michigan corporation, that they had signed and executed the said bill of complaint in behalf of said company and they are duly authorized so to do, and that in behalf of said plaintiff they aver that they have read the contents of said bill of complaint and that as to the matters therein stated the same is true in substance and in fact except as to the matters stated on information and belief, and in respect of such matters the said affiants each for himself believed the same to be true.

KEITH M. HOWELL,
Notary Public, Wayne County, Michigan.

My commission expires February 18, 1924.

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

On this sixteenth day of April, 1920, personally appeared before me, a notary public in and for Wayne County, State of Michigan, William J. Kennedy and Henry E. Gill, who severally made oath and said that they were respectively the president and secretary of Towars Wayne County Creamery, a Michigan corporation, that they had signed and executed the said bill of complaint in behalf of said company and that they are duly authorized so to do, and that in behalf of said plaintiff they aver that they have read the contents of said bill of complaint and that as to the matters therein stated the same is true in substance and in fact except as to matters stated on information and belief, and in respect of such matters the said affiants each for himself believed the same to be true.

MILDRED A. CIDDY,
Notary Public, Wayne County, Michigan.

My commission expires October 5, 1923.

14 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

On this sixteenth day of April, 1920, personally appeared before me, a notary public in and for Wayne County, State of Michigan, J. H. Wilson and Annie Wilson, who severally made oath and said that they were respectively the president and secretary of J. H. Wilson & Sons Creamery Company, a Michigan corporation, that they had signed and executed the said bill of complaint in behalf of said company and they are duly authorized so to do, and that in behalf of said plaintiff they aver that they have read the contents of said bill of complaint and that as to the matters therein stated

the same is true in substance and in fact except as to matters stated on information and belief, and in respect of such matters the said affiants each for himself believed the same to be true.

KEITH M. HOWELL,
Notary Public, Wayne County, Michigan.

My commission expires February 18, 1924.

STEVENSON, CARPENTER, BUTZEL & BACHUS, and D. B. HAYES, Detroit, Mich., *attorneys for plaintiff.*

Filed April 17, 1920.

ELMER W. VOORHEIS,
Clerk.

15 *Answer of John E. Kinnane, U. S. attorney.*

United States of America. In the District Court of the United States for the Eastern District of Michigan, Southern Division. In equity.

DETROIT CREAMERY COMPANY, BELLE ISLE EAST SIDE Creamery Company, John Schlaff Creamery Company, State Creamery Company, Towars Wayne County Creamery, J. H. Wilson & Sons Creamery Company, complainants,

vs.

JOHN E. KINNANE, WILLIAM F. CONNOLLY, FRED H. Diehl, W. William Brogan, Frances E. Burns, C. A. Clark, W. J. Cusick, and A. E. Sarvis, defendants.

No. 331.

The answer of John E. Kinnane, United States attorney for the Eastern District of Michigan, to the bill of complaint filed in the above entitled cause, shows:

(1) This defendant admits paragraph one of the bill of complaint filed in said cause, except that part which states that the complainants are "within the statutes covering and defining the jurisdiction of this court," and avers that all of the said complainants are residents of the State of Michigan and of the Eastern District thereof, and all of said defendants are residents of said State and district.

(2) This defendant admits that each of the complainants has been, for a long time, in the business of purchasing milk, preparing the same for market and for distribution within the city of Detroit and additional territory, and admits that each of said complainants has an investment in its business of $100,000.00 and upwards, and that the purchase of milk and its preparation and delivery to the ultimate consumer at retail is essential and an important part
16 of the business of each of said complainants, but alleges that the complainants do not purchase milk direct from the pro-

ducers, but through an organization of the producers known as the Michigan Milk Producers' Association.

(3) This defendant admits that the price of milk for several years past in Detroit has been established between producers and distributors and the public, by a body of men called the Detroit milk commission, but avers that said commission has no legal existence and no legal authority whatsoever. Defendant admits that the schedule fixed from time to time by the so-called commission has protected the rights of the producers and distributors, but denies that said commission is representative of the public or has protected the consumers' rights. Defendant has no knowledge as to the expertness of the members of the commission, and neither admits nor denies the allegation regarding the same, but avers and charges the fact to be that the members of said commission are in high favor with the said producers' association, and the organization of the milk distributors, to wit, the Detroit Bottle Exchange, so much so that these two organizations provide in their contract that they agree to accept "such prices for milk delivered as the Detroit milk commission, as at present constituted, shall determine and fix."

This defendant admits that the prices of milk fixed by the so-called milk commission are as alleged in paragraph 3 of said bill, and avers that the prices are further fixed by said commission for milk to the consumer by the pint, at 10¢ per pint, which is an unreasonable and excessive price, being an advance of over 25% over the price of milk delivered in quarts, and this defendant is informed that this provision is extensively abused by dealers who sell by the pint, claiming that they have no quart bottles, or no milk in quart bottles, thereby exacting 20¢ per quart from the consumer.

(4) This defendant admits that the defendant herein, other than himself, constitute the body designated as the Federal Fair Price Committee, and avers that said defendants and each of them have been duly appointed as such members of said committee by the Attorney General, acting for and on behalf of the President of the United States, under the act of Congress known as the Lever Act, and the amendments thereto adopted by Congress in, to wit, the month of October, 1919.

(5) This defendant denies the allegation in paragraph 5 of said bill of complaint that said defendants, other than himself, are not legally appointed, and avers that they were appointed regularly by the Attorney General, and that each of them holds his commission from the Attorney General in Washington, and that they and each of them have filed their oaths of office in the Department of Justice at Washington.

(6) This defendant admits paragraph 6 of said bill.

(7) This defendant admits that he recommended the appointment of the persons constituting said fair-price committee, but avers that the appointment of the committee and its members was made by the Attorney General of the United States as aforesaid.

(8) This defendant admits that he occupies the position of United States attorney for the Eastern District of Michigan and is charged with the duty of enforcing the laws of the United States in said district. He admits that he has stated that as such officer he will give the support of his office to the work of said fair-price committee, acting within proper limits, and that he approves of the judgment of said fair-price committee in its action relative to the price of milk in the city of Detroit; that he has not made any statement or reached any determination as to any method of procedure against the complainants or others who sell milk at excessive prices for obvious reasons, as it is necessary to act upon conditions that develop in matters of that kind, and that it is probable that prosecutions would be based on the provisions of the Lever law, so called, providing punishment for monopolizing or attempting to monopolize the milk supply of the city of Detroit, or for conspiring to limit the facilities for supplying milk to said city, or to restrict said supply or to restrict the distribution thereof, in order to enhance the price thereof.

(9) This defendant admits that the complainants have built up their respective businesses through a series of years in the sale and distribution of milk, and that deliveries are made from door to door by them to householders or the ultimate consumer, as well as to those using large quantities of milk. He admits that the complainants sell daily upwards of 200,000 quarts of milk in said city, and on information and belief admits that the quantity sold by each of the complainants is substantially as stated in paragraph 9 of said bill. This defendant is not informed as to the number of salesmen employed by all of said complainants, but believes it is approximately 500, as stated in paragraph 9 of said bill.

This defendant, further answering, avers that the arrangement and system through which milk is furnished to Detroit is not known to the public, but is substantially as follows: That between the producer and consumer of milk are two powerful organizations, to wit, the Michigan Milk Producers' Association and the Detroit Bottle Exchange. The first of these acts for the producers of milk in what is known as the "Detroit milk area," and the second, the
17 Detroit Bottle Exchange, is the organization of the milk distributors in and around Detroit. The "Detroit milk area" is a limited zone arbitrarily created by said organizations, embracing the territory lying in the State of Michigan within 70 miles from the city of Detroit, it being defined in their contracts as follows:

"The Detroit milk area as referred to above shall be construed to include all that territory lying within a radius of 70 miles of the city of Detroit."

That in and by such contract (a copy being hereto attached and marked "Exhibit A" and made a part hereof) it is, among other things, provided that said Detroit distributors shall buy, receive, handle or distribute no milk other "than that purchased from party of the first part, without the consent of the first party in writing,"

and further providing that if said first party should consent, that the distributors handle any other milk than from said limited zone and covered by their contract, that it shall be on terms covered by said contract. Provision is also made in the scheme for distribution that the Milk Producers' Association obtain from the milk producers in its territory exclusive contracts for the handling and marketing of the milk produced by them, together with the provision that the Detroit distributors, through its said bottle exchange, shall deduct from and pay over to the Milk Producers' Association 1¢ for every 100 pounds of milk delivered under the contracts, which amounts in the aggregate to approximately $60,000.00 a year.

The Detroit Bottle Exchange includes in addition to the complainants herein, substantially all of the milk distributors in the city of Detroit, and the total amount of milk supplied to said city of Detroit and suburbs, is approximately 90,000 gallons or
18 360,000 quarts, per day. At the price that this milk is now being delivered, the aggregate sum paid by the public therefor is something more than $20,000,000.00 per year.

That the price now fixed and paid to the purchasers is $4.05 per hundred pounds and each 100 pounds contains 46 quarts of milk. Therefore, the price received by the producers is approximately 8.8c a quart, while the amount received by the distributors is 7.2¢ a quart. These figures extended in the aggregate show the following results: That for the 365 days of the year the milk producers receive for the milk which supplies the city and vicinity approximately $11,000,000.00, while the distributors receive as their share approximately $9,000,000.00, or nearly as much for the distribution and delivery of milk in the city as is paid to the men and people who produce and bring it here. That this arrangement deprives the city of Detroit, in an arbitrary and unreasonable manner of its natural supply of milk from the territory tributary to the city, limiting such supply to an arbitrary zone of 70 miles, which apparently has not been extended to meet the city's phenomenal growth and greater demands for milk. That purchasers outside of this 70-mile zone are barred from delivering milk in the city, through the above contracts and combination, and the city is deprived of the benefit of the additional supply of milk that would come from the territory, if the same was not arbitrarily barred out as aforesaid.

And this defendant further avers that he is informed and convinced, from a large amount of evidence collected, that producers of milk outside of the 70-mile zone, who do not belong to the aforesaid Milk Producers' Association, who have attempted to bring
19 their milk to Detroit and sell it to the public have been subjected to unfair competition and driven out of business. Defendant is informed and believes that said complainants are making hugh profits in handling and distributing milk in the city of Detroit, and that a number of them have paid and are paying stock dividends, and large cash dividends, and are making profits,

which are derived from the very large margin which they make per quart for distributing milk as aforesaid.

That this defendant has investigated the business, the handling and the delivery of milk, with much care, and believes that a charge of more than 7¢ per quart for delivering milk to the consumer is excessive and unreasonable. Therefore, this defendant said that a reduction in the price of milk if borne entirely by the distributors of milk, which includes the complainants, would not unfairly reduce their profits or constitute an injury to their businesses.

(10) This defendant says that he has not attempted to follow the computations and calculations set forth in paragraph 10 of the bill of complaint, but avers that they are not entitled to serious consideration and merely represent imaginary calculations.

(11) This defendant does not know what property and vehicles or organizations defendants have for the distribution of milk by reason of the lack of definite knowledge, neither admits nor denies the allegations in paragraph 11 of the bill, but leaves complainants to their proof.

(12) This defendant denies making the threats alleged in paragraph 12 of the bill as heretofore explained in this answer.

(13) This defendant denies that the Lever Act, so called, together with the amendment thereto, is invalid or unconstitutional for the reasons alleged in paragraph 13 of the said bill.

20 (14) This defendant admits that the subject matter of the controversy amounts to more than $3,000.00 and avers that 1¢ a quart on the milk supply of Detroit amounts to more than $1,000,000.00 a year. This defendant denies that compliance with the prices fixed by the fair price committee would involve the complainants in litigation over existing contracts for supplying milk and avers that in his opinion they could well afford to pay the producers the price which they are now paying without any legitimate injury to their businesses.

That with reference to threats, this defendant repeats what he has already said in paragraph 8 of this answer, and calls attention to his position heretofore stated in this answer. He denies that the prices fixed by the fair price committee are confiscatory or unfair and denies the right of complainants to carry on their businesses in such a way as to monopolize the milk business of the city of Detroit and to exact from consumers an excessive price for milk. He denies all other allegations in paragraph 14 not herein specifically admitted or denied.

(15) Defendant denies that the prices fixed by the fair price committee would, if complainant were compelled to abide by them, cause an irreparable injury to complainants' businesses, and denies that complainants are without adequate remedy at law.

(16) Defendant further answering, on information and belief, denies that the fair price committee acted capriciously, and without giving a hearing to the milk producers and distributors, and avers on like information and belief that a full hearing was given.

Defendant denies that it would involve a reduction in the price now paid to producers for milk and denies that it would create
21 a shortage of milk for the city of Detroit, unless such shortage was brought about by collusion between the two powerful agencies above referred to, the Michigan Milk Producers Association and the Detroit Bottle Exchange, which control the supply. He denies that the price fixed by the committee is confiscatory and denies that it would deprive complainants of a legitimate, legal, and proper profit in the business.

(17) This defendant says that the matters set up in paragraph 17 of the bill are not allegations of fact, but merely a reference to a decision of a court in a distant State, and defendant believes that he is not called upon to answer in any way the allegations in this paragraph.

(18) This defendant avers that said fair price committee and its members are involved in this controversy only on account of a past action on their part, and that no relief is sought against such past action, and no further action by said committee is prayed for in said bill, or contemplated so far as appears, and therefore there is a complete absence of any ground for an injunction against said committee.

This defendant further avers that no ground exists for an injunction against him as United States attorney for the Eastern District of Michigan, and that his right to act in his official capacity in accordance with his judgment on matters arising in his district can not properly be restrained by the court, and that any question arising under the law referred to which relates to its validity or its constitutionality can be readily tested by proper action when indictments are returned under the same, and under such proceedings, where an indictment is challenged on the ground aforesaid, speedy review of the same can be had before the Supreme Court of the United States, thereby settling the question as to the validity of the law conclusively and finally as to this and all other proceedings.

22 Defendant avers that this bill of complaint is filed solely to procure an injunction restraining the officers mentioned therein from acting in the line of their duty under the said statute known as the Lever Act, the said injunction being the one relief sought and not being incidental to any other proceeding.

For the above reasons and others, defendant says that the relief prayed for should be denied and the bill of complaint dismissed.

JOHN E. KINNANE,
United States Attorney, Eastern District of Michigan, Defendant.

EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, COUNTY OF WAYNE, *ss.*

John E. Kinnane, being duly sworn, deposes and says that he has read the foregoing answer subscribed by him as United States at-

torney for the Eastern District of Michigan and that the matters stated in the same are true, except as to those matters therein stated to be upon information and belief, and in respect to such matters said affiant believes the same to be true.

JOHN E. KINNANE.

Subscribed and sworn to before me this 28th day of April, A. D. 1920.

ELMER W. VOORHEIS,
Notary Public, Wayne County, Michigan.

My commission expires May 12, 1922.

23 *Agreement between the Michigan Milk Producers Association and Detroit milk distributors.*

No. 7639.

This agreement, made this ——— day of ————, A. D. 1918, by and between the Michigan Milk Producers' Association, a Michigan corporation, party of the first part, and ————————, party of the second part, witnesseth as follows:

Party of the first part agrees to sell to the party of the second part, and the party of the second part agrees to buy of the first part the milk of such of its members as the second party has been purchasing from during the month of December, 1918: Provided, however, that if any member at the time of signing his application for membership and agreement to make the said first party his selling agent for the year 1919, shall refuse or elect not to deliver his milk to the said second party, then the milk of such member shall be relieved from this agreement: And provided further, should the said second party desire to discontinue buying the milk of any member or members, they may be relieved from so doing by notifying the said second party in writing prior to January 1, 1919, giving the names and addresses of such above-mentioned members. This milk is to be bought and sold under the following terms and conditions:

For and in consideration of the mutual covenants, understandings, and agreements and advantages to the parties hereto, hereinafter contained, it is hereby mutually understood and agreed by and between the parties hereto that—

The party of the second part agrees to pay to the parties within the Detroit milk area from whom they receive milk during the period of from January 1, 1919, to January 1, 1920, such prices for milk delivered as the Detroit milk commission, as at present constituted, shall determine and fix, and to pay to the Michigan Milk Producers' Association one cent (1¢) per hundred pounds on all milk received or purchased within the said Detroit milk area as herein defined, and the parties to this contract hereby agree that the

prices so determined and fixed shall be the contract price, and
24 that from such price one cent (1¢) per hundred pounds shall be paid to the party of the first part and the remainder to the various parties furnishing the milk.

The milk furnished under this agreement shall be milked and handled in a cleanly manner in clean utensils, and the animal heat shall be removed by cooling immediately after milking; it shall also be produced and handled according to the rules promulgated by the Detroit board of health, and it shall be delivered daily either in Detroit or at a receiving station of the party of the second part.

Party of the second part agrees to buy, take, receive, handle, or distribute no milk other than that purchased from the party of the first part without the consent of the first party in writing, and in case such consent be given, the second party agrees to pay the first party one cent (1¢) on each hundred pounds for milk so purchased, taken, received, or distributed.

Should the party of the second part at any time require more milk for ———— trade ———— shall notify the party of the first part, and said party will endeavor to supply the same from the dairies of other producers, but in such case, unless by special agreement in writing to the contrary, the second party shall continue to take and pay for as above provided the milk from such newly acquired producer until the end of this contract period.

The party of the second part agrees to take fair and representative samples of the milk of each patron at least twice each month, and to make accurate tests of such sample to determine the per cent of butter fat contained therein, and to pay for milk delivered each month on or before the fifteenth of the following month.

Second party also agrees that the first party or its agent may at any time enter the second party's plant or receiving stations for the purpose of inspecting and sampling and testing of the milk, and if desired such agent shall be permitted to take samples and test the same. Should the contracting parties hereto be unable to agree upon the test, the matter shall be referred to the State food and drug commissioner, and his decision shall be final and binding on both parties.

25 It is further understood and agreed by and between the parties hereto that in the event of a general strike by the employees of said second party or of any transportation company or other unavoidable conditions whereby said second party is obliged to close down and *and* discontinue ———— business temporarily or permanently the said second party shall be released from ———— obligations under this contract during the continuance of such above-mentioned conditions, provided said milk commission shall decide that the said second party should in justice be released from said obligations.

The Detroit milk area as referred to above shall be construed to include all that territory lying within a radius of seventy miles of the city of Detroit.

This agreement shall be in force and effect from January 1, 1919, to January 1, 1920.

Witness our hands and seals the day and year first above written.

MICHIGAN MILK PRODUCERS' ASSOCIATION,
By ——— ———, *Secretary.*

Filed April 20, 1920.

ELMER W. VOORHEIS, *Clerk.*

26 *Answer of William F. Connolly.*

United States of America. In the District Court of the United States for the Eastern District of Michigan, Southern Division, in Equity.

DETROIT CREAMERY COMPANY, BELLE ISLE EAST SIDE Creamery Company, John Schlaff Creamery Company, State Creamery Company, Towar's Wayne County Creamery, J. H. Wilson & Sons Creamery Company, plaintiffs,

vs.

JOHN E. KINNANE, WILLIAM F. CONNOLLY, FRED H. Diehl, William Brogan, Frances E. Burns, C. A. Clark, W. J. Cusick, and A. E. Sarvis, defendants.

No. 331.

The answer of William F. Connolly, defendant in the above-entitled cause to bill of complaint filed therein:

1. The defendant neither admits nor denies the allegations in the 1st and 2nd paragraphs of plaintiffs' bill of complaint, but as to the same leaves plaintiffs to their proofs.

2. Defendant denies the allegations in the 3rd paragraph of plaintiffs' bill of complaint; he denies that the Detroit milk commission is a body composed of men who, by reason of continuing investigation and contact with the conditions properly entering into a reasonable price for the retail and wholesale sale of milk have become practical experts, and denies that under the price schedule fixed from time to time by such commission the rights of the producers and distributors on the one hand and of the public on the other
27 have been duly protected and safeguarded, and denies that this defendant or the other defendants associated with him as members of the Federal fair price commission have committed any illegal and unlawful action.

3. Defendant admits that he and the other defendants, other than John E. Kinnane, claim and assert that they compose a board or body designated as "Federal Fair Price Commission," and that their authority is founded and vested upon certain statutes of the United States as set forth in paragraph 4 of plaintiffs' bill of complaint.

4. Defendant denies the allegations of the 4th paragraph of plaintiff's bill of complaint, and avers that he and the other members thereof were legally appointed and do now legally hold such office, and defendant denies the further averment of plaintiffs' 5th paragraph that their actions are void and of no effect.

5. The defendant admits the allegations of the 6th paragraph of plaintiffs' bill of complaint.

6. Defendant denies the allegations of the 7th paragraph of plaintiffs' bill of complaint.

7. Defendant neither admits nor denies the allegations of the 8th paragraph of plaintiffs' bill of complaint, but as to the same leaves plaintiffs to their proofs.

8. Defendant neither admits nor denies the allegations of the 9th paragraph of plaintiffs' bill of complaint, but as to the same leaves plaintiffs to their proofs.

9. Defendant neither admits nor denies the allegations of the 10th paragraph of plaintiffs' bill of complaint, but as to the same leaves plaintiffs to their proofs.

10. Defendant neither admits nor denies the allegations of
28 the 11th paragraph of plaintiffs' bill of complaint, but as to the same leaves plaintiffs to their proofs.

11. Defendant denies the allegations of the 12th paragraph of plaintiffs' bill of complaint, and says that neither this defendant nor the other defendants associated with him on the Federal fair price commission have exercised any threats or intimidations toward plaintiffs or their employees, and states that the said defendants associated with him on the Federal fair price commission have done no more than enter a finding that in their judgment the fair price of milk at retail in Detroit on and after April 15th, 1920, should be not more than 14 cents per quart and 8 cents per pint, and not more than 13 cents per quart and 7 cents per pint wholesale.

12. Defendant neither admits nor denies the allegations of the 13th paragraph of plaintiffs' bill of complaint, but as to the same leaves plaintiffs to their proofs.

13. Defendant neither admits nor denies the allegations of the 14th paragraph of plaintiffs' bill of complaint, but as to the same leaves plaintiffs to their proofs.

14. Defendant denies the allegations of the 15th paragraph of plaintiffs' bill of complaint in so far as said allegations set forth the illegality of the Federal statutes under which this defendant and his associates on the Federal fair price commission are acting.

15. Defendant denies the allegations of the 16th paragraph of plaintiffs' bill of complaint, and denies that either he or his associates on the Federal fair price commission acted capriciously and without affording the plaintiffs any real opportunity to be heard and without any proper examination or investigation into the facts, but states
to the contrary that he and his associates on the Federal fair
29 price commission gave an adequate hearing and made an adequate investigation upon which to found their judgment

as aforesaid. This defendant further states that while the Detroit milk commission has assumed to fix the price for milk in Detroit it is a wholely extra legal body and that its action in that regard is void and without binding force and effect upon anybody. As to the other allegations of the 16th paragraph of plaintiffs' bill of complaint, this defendant neither admits nor denies the same, but leaves plaintiffs to their proofs, except that this defendant states that the price fixed by the defendants herein is not confiscatory, but on the contrary, is a fair and reasonable price for milk in the city of Detroit at this time.

16. This defendant neither admits nor denies the allegations of the 17th paragraph of plaintiffs' bill of complaint. This defendant denies that the plaintiffs or any of them are entitled to the relief in their said bill of complaint prayed, but further state that there is no future action of this defendant or his associates on the Federal fair price commission to be enjoined or restrained in this behalf; that they have done their full duty under the law and are now in this behalf functus officio, and this defendant therefore prays that the plaintiffs' bill of complaint be dismissed as to himself and his associates on the Federal fair price commission, viz, Fred H. Diehl, William Brogan, Frances E. Burns, C. A. Clark, W. J. Cusick, and A. E. Sarvis.

WILLIAM F. CONNOLLY.

30 EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, COUNTY OF WAYNE, *ss:*

William F. Connolly, being duly sworn, deposes and says that he has read the foregoing answer subscribed by him, and that the matters stated in the same are true except as to those matters therein stated to be on information and belief, and as to those matters he believes it to be true.

WILLIAM F. CONNOLLY.

Subscribed and sworn to before me this 22nd day of April, A. D. 1920.

BARBARA C. THOMAS,
Notary Public, Wayne County, Mich.

My commission expires Nov. 8, 1920.

Filed April 22, 1920.

ELMER W. VOORHEIS,
Clerk.

31 In the District Court of the United States for the Eastern District of Michigan, Southern Division.

DETROIT CREAMERY COMPANY ET AL., PLAINTIFFS,
vs.
JOHN E. KINNANE ET AL., DEFENDANTS. } No. 331.

Messrs. Stevenson, Carpenter, Butzel & Backus, and Mr. D. B. Hayes, of Detroit, Michigan, attorneys for plaintiffs.

Hon. John E. Kinnane, of Bay City, Michigan, United States district attorney.

Preliminary memorandum opinion.

TUTTLE, District Judge: After careful consideration of the bill of complaint and answer, I am of the opinion that the application for a temporary injunction should be granted pending the final hearing.

I am satisfied that the provision of section 4 of the food control act, as amended, making it unlawful for any person "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" standing alone, is too vague and uncertain to constitutionally create any offense against the United States, as that would make the criminality of the act denounced depend in any given case upon the opinion of the jury in that case as to whether the rate or charge involved therein was just or unjust, reasonable or unreasonable, without any definite standard or test for the guidance of such jury or of the accused. United States vs. Brewer, 139 U. S. 278, 35 L. Ed. 190; Louisville & Nashville R. R. Co. vs. Railroad Commission of Tennessee, 19 Fed. 679; Tozer vs. United States, 52 Fed. 917; Hocking Valley Ry. Co. vs. United States, 210 Fed. 735; United States vs. L. Cohen Grocer Co. (recent unreported decision of United States District Court for Eastern District of Missouri); United States vs. Capital Traction Company, 34 App. D. C. 592; Louisville & Nashville R. R. Co. vs. Commonwealth, 99
32 Ky. 132, 35 S. W. 129.

This indefiniteness and vagueness in the statute can, in my opinion, be cured only if provision has been lawfully made for proper investigation, hearing, and findings by some officer or tribunal properly created under said statute; and even in that event such findings must, of course, be in accordance with the due process of law. Whether such provision has been made and, if so, whether such due process of law has been followed, are questions which are open to grave doubt, but which need not be determined now in advance of final hearing. In view, however, of the allegations in such bill as to the confiscatory character of the price schedule alleged therein to have been fixed by a so-called fair price commission, it seems clear that the restraining order sought should be

granted, even assuming that the statute itself is not unconstitutional and void for the reason just referred to.

It is clear that the allegations of the bill make the equitable relief prayed the proper remedy. Vicksburg Water Works Co. vs. Vicksburg, 185 U. S. 65, 46 L. Ed. 808; Cincinnati vs. Cincinnati & Hamilton Traction Co., 245 U. S. 446, 62 L. Ed. 389.

Judicial notice is taken of the fact that during the past few days numerous criminal prosecutions have been instituted in this district, indictments returned and arraignments had under section four of the food control act charging that unjust or unreasonable prices have been charged for necessaries, indicating an intention on the part of the United States attorney for this district to enforce said clause of said act.

It follows that the temporary restraining order will be entered forthwith.

ARTHUR J. TUTTLE,
District Judge.

DETROIT, MICHIGAN, *April 20th, 1920.*

Filed April 20, 1920.

ELMER W. VOORHEIS,
Clerk.

33

Restraining order.

United States of America. In the District Court for the Eastern District of Michigan, Southern Division.

BELLE ISLE EAST SIDE CREAMERY COMPANY, DETROIT Creamery Company, Towar's Wayne County Creamery Company et al., plaintiffs,

vs.

JOHN E. KINNANE, WILLIAM F. CONNOLLY, ET AL., defendants. } No. 331.

In the above-entitled cause application having been made for a temporary injunction, the court after reading bill of complaint and answer, and after due consideration thereof doth order and decree that the defendant John E. Kinnane be restrained and prohibited, until the further order of the court, from enforcing or attempting to enforce any criminal proceedings against the plaintiffs or any one of them for violation of section 4 of Lever Act on the charge of making an unjust or unreasonable rate or charge in handling or dealing in or with any necessaries.

Dated Detroit, Michigan, April 20, 1920.

ARTHUR J. TUTTLE,
District Judge.

Countersigned—
ELMER W. VOORHEIS,
Clerk.

Filed April 20, 1920.

ELMER W. VOORHEIS,
Clerk.

34 *Stipulation waiving proofs.*

United States of America. In the District Court of the United States for the Eastern District of Michigan, Southern Division, in equity.

DETROIT CREAMERY COMPANY, BELLE ISLE EAST SIDE Creamery Company, John Schlaff Creamery Company, State Creamery Company, Towar's Wayne County Creamery Company, J. H. Wilson & Sons Creamery Company, complainants,

vs.

JOHN E. KINNANE, WILLIAM F. CONNOLLY, FRED H. DIEHL, William Brogan, Frances E. Burns, C. A. Clark, W. J. Cusick, and A. E. Sarvis, defendants.

No. 331.

It is hereby stipulated, by and between the parties to the above-entitled cause, by their respective attorneys, as follows:

That in view of the decision of the court in this cause on April 20, 1920, which granted a temporary restraining order or injunction against the United States attorney for the Eastern District of Michigan, defendant herein, restraining him from prosecuting the complainants, or any of them, under a certain provision of section 4 of the Lever Act, so-called, as amended; and holding and deciding that the provision of section 4 of the aforesaid act of Congress, as amended, in so far as it declares it to be unlawful to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries, or to exact excessive prices for necessaries, is unconstitutional and void; and said decision being controlling and decisive in the case, and based entirely upon the law,

It is therefore considered unnecessary to take proofs in this cause for the reasons aforesaid, the aforesaid question of law being controlling and decisive;

It is therefore stipulated and agreed as aforesaid, that the case proceed to a final hearing without the taking of proofs, and that the taking of proofs herein be dispensed with.

35

LEO M. BUTZEL
and
D. B. HAYES,
Attorneys for Complainants.

JOHN E. KINNANE,
U. S. Attorney.

Filed April 22, 1920.

ELMER W. VOORHEIS,
Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

DETROIT CREAMERY COMPANY ET AL., PLAINTIFFS,
vs.
JOHN E. KINNANE ET AL., DEFENDANTS. } No. 331.

Messrs. Stevenson, Carpenter, Butzel & Backus, and Mr. D. B. Hayes, of Detroit, Michigan, attorneys for plaintiffs.

Mr. James E. Greene, of Lansing, Michigan, attorney for intervenor.

Hon. John E. Kinnane, of Bay City, Michigan, United States district attorney.

Memorandum opinion on final hearing.

TUTTLE, District Judge: The sole question involved in this case is whether the provision of section four of the food control act, also known as the Lever Act, being the act of Congress of August 10, 1917, chapter 53, 40 Statutes at Large, 276, as amended by section two of the act of October 22, 1919, making it unlawful for any person, among other things, "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" is constitutional.

Plaintiffs filed their bill of complaint herein, alleging that they were engaged in the business of purchasing milk from producers thereof and preparing the same for the market and for resale distribution to the consumers thereof within the city of Detroit and adjacent territory; that the price of milk for the past several years in Detroit has been established between the producer and the distributor by the Detroit milk commission, "a body composed of men who, by reason of continuing investigation and contact with the conditions properly entering into a reasonable price for the retail and wholesale sale of milk, have become practical experts"; that under
37 the price schedule fixed from *time* to time by said commission the rights of the said producers and distributors on the one hand and of the public on the other had been properly protected and that the price of milk per quart for sale at retail to the public had been prescribed for the month of March, 1920, at sixteen cents per quart, based on a certain price to the producers as set forth in the bill; that the defendants other than John E. Kinnane (the latter being United States attorney for this district) claimed that they composed a body designated as a "Federal fair price commission," appointed under authority of the so-called Lever Act hereinbefore mentioned, and as such had attempted to prescribe a schedule for the sale of milk at retail to commence April 15, 1920, at fourteen cents per quart; that said defendants did not hold any legal office, and that their action in attempting to prescribe such rate was void and

of no effect; that the defendant, Kinnane, was the United States district attorney, as aforesaid, and as such had stated publicly that he would cause to be prosecuted any person failing to comply with the price schedule so prescribed by the so-called fair price commission mentioned, as a violation of the said Lever Act; that plaintiffs had in their employ upwards of five hundred milk salesmen selling their milk at retail to householders and consumers daily and that the fines capable of being levied or claimed rightfully to be levied on one day's transactions against such salesmen would aggregate millions of dollars; that plaintiffs had in their retail milk business large numbers of vehicles of various kinds, representing many thousands of dollars; that by reason of the aforesaid threats of the defendants against plaintiffs, said milk salesmen would not continue to deliver milk at lawful prices and as a result of the claimed and usurped authority of the defendants, unless restrained, the business of the plaintiffs would be irreparably injured and destroyed; that in so far as said act undertook to make it unlawful for any person "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" it did not legally create
38 any crime under the United States constitution, particularly the sixth amendment thereto, for the reason that such alleged crime was expressed in such vague, indefinite, and uncertain manner, without any reasonably certain standard, as to be a violation of the rights of citizens of the United States, such as the plaintiffs; that the threatened criminal prosecution referred to would involve the plaintiffs in contractual difficulties and litigation over existing contracts for the supplying of milk to them, would result in the destruction of their established business and would operate to deprive the plaintiffs of their property without due process of law, in violation of said constitution and that they were entitled to come into this court to enforce their Federal rights thus threatened; that the defendants were claiming to act under order of the said Lever Act, but as such act is void it affords them no justification and renders them liable to be enjoined from inflicting upon plaintiffs the wrongs complained of, and that the plaintiffs had no adequate remedy at law and this court had sole jurisdiction of the subject matter of their grievance; that the said defendants other than the said Kinnane acted capriciously and without affording the plaintiffs any real opportunity to be heard and without any proper examination or investigation into the facts, and that the price fixed by such so-called Federal fair price commission was confiscatory and illegal. Plaintiffs further challenge the constitutionality of said Lever Act on the grounds that it was vague, indefinite and uncertain; that it fixed no immutable standard of guilt but left such standard to the variance of the different courts and juries which might be called upon to enforce it; that it did not inform those accused of its violation of the nature of the accusation against them nor as to what acts would constitute such violation; that it failed to define a crime, but in essence merely declared that any person who should commit any unjust

or unreasonable act should be guilty of a felony; and that if enforced it would deprive citizens of the United States of their property and liberty without due or any process of law. Plaintiffs prayed that the defendants be enjoined temporarily
39 and permanently from attempting to enforce the schedule of rates complained of, from interfering with the free conduct of their business by commencement of criminal proceedings or otherwise, and from harrassing or oppressing them in the premises. The bill concluded with a prayer for general relief.

An answer was filed by the district attorney in which he alleged that he and the other defendants constituted a body designated as the Federal fair price committee, having been legally so appointed by the Attorney General of the United States; that as district attorney he approved of the judgment of said committee in its aforesaid action; that he had not made any statement or reached any determination as to any method of procedure against the plaintiffs for selling milk at excessive prices, but that it was probable that prosecution would be based on the provisions of said Lever Act providing punishment for monopolizing or attempting to monopolize the milk supply of the city of Detroit or for conspiring to limit the facilities for supplying milk to said city, or to restrict said supply or the distribution thereof in order to enhance the price thereof; that the arrangements under which the producers and distributers, including the plaintiffs, supplied milk to said city deprived the latter, in an arbitrary and unreasonable manner, of its natural supply thereof and restricted the free sale of milk to the people of said city; that the plaintiffs were making hugh profits in handling and distributing milk in said city and that a number of them had paid stock dividends and large cash dividends derived from the very large margin which they make per quart for distributing said milk; that the retail charge made by plaintiff for delivering milk to consumers was excessive and unreasonable and that a reduction in such price if borne entirely by the distributers of milk, including the plaintiffs, would not unfairly reduce their profits or injure their business; that the said Lever Act as amended was not unconstitutional as charged in the bill; that compliance with the prices fixed by the said fair price committee would not involve the plaintiffs in litigation over existing contracts for supplying milk; that such prices were not confisca-
40 tory or unfair and would not cause irreparable injury to plaintiffs; that such prices were not fixed capriciously, but after a full hearing to the milk producers and distributors; that no ground exists for an injunction against him as United States attorney, as his right to act in his official capacity in accordance with his judgment can not properly be restrained by this court, but that any question arising under the law involved can be readily tested by proper action in proceedings brought for the enforcement thereof and that the relief prayed should be denied and the bill of complaint dismissed.

An intervening petition was filed by the Michigan Milk Producers Association, alleging that it was composed principally of farmers and dairymen throughout the State of Michigan who were engaged in the business of selling and delivering milk to the plaintiffs and that such association was under contracts with the plaintiffs for the sale of such milk, all of which was produced by the members of said association upon their farms to be distributed and sold within said city of Detroit and vicinity. Petitioner alleged that by virtue of said contracts it claimed an interest in this suit and that as it would be vitally affected by the outcome of such suit it prayed for permission to intervene as a codefendant therein and to file a separate answer in order to protect its interests. In such answer as afterwards filed, said petitioner admitted the material allegations in the bill and practically joined with the plaintiffs seeking the same relief and on the same grounds prayed by them.

On the hearing of the application for temporary injunction, the defendants, including the district attorney, conceded that the Federal fair price commission, also referred to as the Federal fair price committee, referred to in the pleadings, had no official standing or authority to fix rates or charges which were binding upon anyone, but was limited in its functions to informal investigations into conditions
41 surrounding the making of prices for the commodities mentioned in the Lever Act and to advising, in an unofficial capacity, the district attorney in connection with such prices.

On such hearing this court granted such application as against the district attorney and issued such temporary injunction pending the final hearing on bill and answer, restraining said district attorney "until the further order of the court, from enforcing or attempting to enforce any criminal proceedings against the plaintiffs or anyone of them for violation of section four of the Lever Act on the charge of making an unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." In view on the concession just mentioned in regard to the status of the other defendants, they were not made parties to said injunction.

The parties hereto have now filed a stipulation setting forth that "in view of the decision of the court in this cause on April 20, 1920, which granted a temporary restraining order or injunction against the United States attorney for the Eastern District of Michigan, defendant herein, refraining him from prosecuting the complainants, or any of them, under a certain provision of section 4 of the Lever Act, so called, as amended; and holding and deciding that the provision of section 4 of the aforesaid act of Congress, as amended, in so far as it declares it to be unlawful to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries, or to exact excessive prices for necessaries, is unconstitutional and void; and said decision being controlling and decisive in the case, and based entirely upon the law, it is therefore considered unnecessary to take proofs in this cause for the reasons aforesaid, the aforesaid question of law being controlling and decisive; it is therefore stipulated and

agreed as aforesaid, that the case proceed to a final hearing without the taking of proofs, and that the taking of proofs herein be dispensed with."

42 The only question, therefore, now involved is whether the provision of section four of this Lever Act as amended to the effect that "it is hereby made unlawful for any person * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," is constitutional.

The sixth amendment to the Federal Constitution provides that "in all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation." It seems clear that an indictment which, following the language of this statute, charged a person with merely having made an "unjust" or "unreasonable" rate or charge in handling or dealing in or with any necessaries would be wholly insufficient to inform such person of the nature and cause of the accusation thus made.

Such an indictment, however, could not specify the offense thus charged with any more detail for the reason that the statute purporting to create such offense does not state the facts, acts or conduct necessary to constitute the crime denounced. What is an unjust rate or an unreasonable charge? In determining this question, what elements are to be taken into consideration? What is the test or standard or basis which is to be used in attempting to ascertain whether this statute has been violated? The statute itself furnishes no assistance in the way of answering this question. Is the reasonableness or justice of a rate to be determined by the amount of profit derived therefrom? If so, what percentage of profit from the business of selling a certain article makes the rate or charge in handling or dealing in that article unreasonable and therefore unlawful and criminal? If such profit is derived from a business devoted to the sale of several kinds of articles, how is the portion of such profit properly chargeable to each of such articles to be determined so that the person engaging in such business may know whether or not

43 he is a criminal? What elements enter into the question whether any particular charge is just or unjust, reasonable or unreasonable? What relation to the reasonableness of a rate have the cost of labor, the cost of machinery and of raw material, the cost of overhead charges, and the other expenses of production? How is the amount properly chargeable to these expenses to be fixed and ascertained? To what extent are differences in market conditions in different places to be considered? Is the existence or absence of competition to be taken into account? Is any allowance to be made for losses and misfortunes which affect costs and profits? To whom must a rate or charge be unjust, to be "unjust" within the meaning of this statute? Is it the effect which a rate or charge has upon the seller or which it has on the purchaser which renders it reasonable or unreasonable? These and other questions which readily suggest themselves naturally and perhaps necessarily enter into a consideration of the nature of the proper test or standard by which the crimi-

nality of any act under this statute must be determined. To the statute itself we look in vain for answers to any of such questions. It furnishes no means for the guidance of courts, juries, or defendants in determining when or how the statute has been violated. No standard or test of guilt has been fixed. We are left to the uncontrolled and necessarily conjectural judgment, or rather conclusion, of each particular jury, or perhaps, court, before which the accused in any given case may be on trial for his liberty. Making, as it does, the question of guilt dependent upon this mere conclusion, or opinion, of the court or jury as to whether the rate or charge involved be just or unjust, reasonable or unreasonable, I can not avoid the conclusion that this statute is too vague, indefinite, and uncertain to satisfy constitutional requirements or to constitute due process of law. United States vs. Brewer, 139 U. S. 278, 35 L. Ed. 190; Louisville & Nashville R. R. Co. vs. Railroad Commission of Tennessee, 19 Fed.
44 679; Tozer vs. United States, 52 Fed. 917; Hocking Valley Ry. Co. vs. United States, 210 Fed. 735; United States vs. L. Cohen Grocer Co. (recent unreported decision of the United States District Court for Eastern District of Missouri); United States vs. Capital Traction Company, 34 App. D. C. 592; Louisville & Nashville R. R. Co. vs. Commonwealth, 99 Ky. 132, 35 S. W. 129.

It is, of course, extremely unfortunate that in enacting this statute Congress should have neglected to observe the constitutional guaranties applicable, but this court can not amend the statute, either by judicial construction or otherwise, but can only interpret and apply it in accordance with rules of law. Any argument based upon what may be thought to be the practical effect of proper judicial construction must be addressed to the only tribunal which made or can make this statute or any other statute deemed by it necessary to carry out the purposes for which it passed this unconstitutional law. There can be no doubt of the power of this court to enjoin the defendant, although occupying the official position which he does, from attempting to enforce an unconstitutional criminal statute against the plaintiffs, in excess of his lawful authority and to their threatened and resultant irreparable injury, as alleged in the bill of complaint herein. Philadelphia Co. vs. Stimson, 223 U. S. 605, 56 L. Ed. 570; William Cramp & Sons Ship & Engine Building Co. vs. International Curtis Marine Turbine Co., 246 U. S. 28, 62 L. Ed. 560.

The commencement of various criminal prosecution based upon alleged violation of the statutory provision here involved clearly indicates the intention of the defendant district attorney to attempt the enforcement of this particular provision of the statute, and shows beyond doubt the propriety and necessity of the injunction sought.

Plaintiffs, however, are not required to wait until criminal
45 prosecutions are actually brought against them, before invoking the equitable relief to which they are entitled under the circumstances. Vicksburg Water Works Co. vs. Vicksburg, 185 U. S. 65, 46 L. Ed. 808; Waite vs. Macy, 246 U. S. 606, 62 L. Ed. 892.

In view of some of the allegations in the answer, it may not be amiss to make it entirely plain, if it is not already, that the only portion of this statute involved, construed, or considered here is the provision therein prohibiting the making of an "unjust or unreasonable rate or charge in handling or dealing in or with necessaries." No opinion is expressed concerning the meaning, scope, or effect of any other portions of such statute.

A decree will be entered making the temporary injunction permanent against the defendant Kinnane and dismissing the bill as to the other defendants.

ARTHUR J. TUTTLE,
District Judge.

DETROIT, MICHIGAN, *April 23, 1920.*

Filed April 23, 1920.

ELMER W. VOORHEES,
Clerk.

46 *Final decree.*

United States of America. In the District Court of the United States for the Eastern District of Michigan, Southern Division, in equity.

DETROIT CREAMERY COMPANY, BELLE ISLE EAST SIDE Creamery Company, John Schlaff Creamery Company, State Creamery Company, Towar's Wayne County Creamery, J. H. Wilson & Sons Creamery Company, complainants,

vs.

JOHN E. KINNANE, WILLIAM F. CONNOLLY, FRED H. Diehl, William Brogan, Frances E. Burns, C. A. Clark, W. J. Cusick, and A. E. Sarvis, defendants.

No. 331.

At a session of said court continued and held at the district court room of the United States, for the Eastern District of Michigan, Southern Division, in the Federal Building, in the city of Detroit, State of Michigan, within said district, on the 23rd day of April, 1920.

Present: Honorable Arthur J. Tuttle, district judge.

A temporary restraining order or injunction having been entered in this couse on April 20, 1920, restraining John E. Kinnane, United States attorney, from prosecuting the complainants, or any of them, under certain provision of section 4 of the Lever Act, so called, as amended, being the act of Congress approved August 10, 1917, as amended by act of Congress approved October 22, 1919, said court in making said order holding and deciding that the provision of section 4 of the aforesaid act of Congress, as amended, in so far as it declares it to be unlawful to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries, is un-

constitutional and void, as being vague and uncertain, said decision being based upon the aforesaid question of law;

And the said parties to this cause, through their respective attorneys, having by stipulation duly filed in this cause, waived the taking of proofs therein, for the reason that the aforesaid question of
47 law is controlling and decisive, and after a further hearing in which the same was submitted for final decision by the court, in which all parties to said cause by their respective attorneys, were fully heard before the court, and the court being fully advised in the premises,

It is ordered, adjudged, and decreed as follows:

(1) That the defendant, John E. Kinnane, United States attorney for the Eastern District of Michigan be, and he hereby is, permanently enjoined and restrained from enforcing or attempting to enforce any criminal prosecution or proceeding against the complainants, their agents and employees in this cause, or any of them, for making any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries, and that a permanent injunction may issue out of and under the seal of this court, restraining said defendant accordingly.

(2) That as to the defendants in said cause, other than said John E. Kinnane, the bill of complaint is hereby dismissed.

ARTHUR J. TUTTLE,
United States District Judge.

Filed April 23, 1920.

ELMER W. VOORHEIS,
Clerk.

48 *Injunction.*

United States of America. The District Court of the United States for the Eastern District of Michigan, in equity.

The President of the United States of America to John E. Kinnane, United States attorney for the Eastern District of Michigan and to his counselors, attorneys, solicitors, trustees, agents, and servants, and each and every of them, greeting:

Whereas it has been represented to us, in the District Court of the United States for the Eastern District of Michigan, in equity, on the part of Detroit Creamery Company, Belle Isle East Side Creamery Company, John Schlaff Creamery Company, State Creamery Company, Towars Wayne County Creamery, J. H. Wilson & Sons Creamery Company, plaintiffs, that they have lately exhibited their bill of complaint against you, the said John E. Kinnane, United States attorney for the Eastern District of Michigan, defendant, to be relieved, touching the matters therein complained of; in which bill it is stated, among other things, that you are injuring the said plaintiff touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good

conscience; we therefore, in consideration thereof, and of the particular matters in the said bill set forth, do strictly command you, the said John E. Kinnane, United States attorney for the Eastern District of Michigan, and the persons before mentioned, and each and every of you, under the penalty of ten thousand dollars, to be levied of your lands, goods, and chattels, to our use, that you do absolutely desist and refrain from enforcing or attempting to enforce any criminal prosecutions or proceedings against the complainants, their agents, and employees in said cause, or any of them, for making any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries, until the further order of this court.

Witness, the Honorable Arthur J. Tuttle, United States district judge for the Eastern District of Michigan, this 23rd day of April in the year of our Lord, one thousand nine hundred and twenty and of the independence of the United States of America the one hundred and forty-fourth.

[SEAL OF THE COURT.]

ELMER W. VOORHEIS,
Clerk.

Returned and filed April 23, 1920.

ELMER W. VOORHEIS,
Clerk.

49 Form No. 282.

Return on service of writ.

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

I hereby certify and return that I served the annexed injunction on the therein-named John E. Kinnane, United States attorney, by handing to and leaving a true and correct copy thereof with Frank Murphy, assistant United States attorney, personally at Detroit in said district, on the 14th day of May, A. D. 1920.

HENRY BEHRENDT,
U. S. Marshal.
By VERNON LECLAIR,
Deputy.

50 United States of America. In the District Court of the United States for the Eastern District of Michigan, Southern Division, in equity.

DETROIT CREAMERY COMPANY ET AL., COMPLAINANTS,
vs.
JOHN E. KINNANE ET AL., DEFENDANTS.
} No. 331.

Assignments of error.

And now comes the above-named defendant, John E. Kinnane, United States attorney for the Eastern District of Michigan, and

says that the District Court, who rendered the final decree in the above-entitled cause, erred in the following particulars, to wit:

I.

Said District Court erred in holding and deciding that the provision of section 4 of the Lever Act, so called, as amended, being the act of Congress approved August 10, 1917, as amended by act of Congress approved October 22, 1919, which declares it to be unlawful and criminal to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries, or to exact excessive prices for any necessaries, as unconstitutional and void.

II.

Said District Court erred in permanently enjoining said defendant, John E. Kinnane, District attorney as aforesaid, from enforcing or attempting to enforce any criminal prosecution or proceeding against the complainants in this cause, or any of them, for making any unjust or unreasonable charge or rate in handling or dealing in
51 or with any necessaries, or exacting excessive prices for any necessaries.

III.

Said District Court erred in holding the provision of section 4 of said Lever Act, as amended by the act of Congress approved October 22, 1919, which declares it to be unlawful and criminal to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries, unconstitutional and void on the ground of vagueness and uncertainty.

IV.

Said District Court erred in enjoining by the order and decree entered in this cause said defendant, John E. Kinnane, United States attorney, from enforcing or attempting to enforce any criminal prosecution against the complainants in the decree herein, for making any unjust or unreasonable rate or charge in handling or dealing in or with milk in the city of Detroit and State of Michigan, or any other necessaries.

V.

Said District Court erred in holding that the provision of said Lever Act as amended by act of Congress approved October 22, 1919, making it unlawful and criminal to make an unjust or unreasonable rate or charge in handling or dealing in or with necessaries, is unconstitutional and void.

VI.

Said District Court erred in failing and refusing to hold and decide that the provision of the said Lever Act, as amended, mentioned and described in assignment of error No. 1 is valid and constitutional.

VII.

Said District Court erred in failing and refusing to dismiss the bill of complaint filed herein as to all defendants, and in failing and refusing to deny the relief therein prayed for.

JOHN E. KINNANE,
United States Attorney, Eastern District of Michigan, Defendant.

Filed April 24, 1920.

ELMER W. VOORHEIS, *Clerk.*

52

Petition for appeal.

United States of America. In the District Court of the United States for the Eastern District of Michigan, Southern Division, in equity.

DETROIT CREAMERY COMPANY, BELLE ISLE EAST Side Creamery Company, John Schlaff Creamery Company, State Creamery Company, Towar's Wayne County Creamery, J. H. Wilson & Sons Creamery Company, complainants,

vs.

JOHN E. KINNANE, WILLIAM F. CONNOLLY, Fred H. Diehl, William Brogan, Frances E. Burns, C. A. Clark, W. J. Cusick, and A. E. Sarvis, defendants.

No. 331.

John E. Kinnane, United States attorney, defendant in the above-entitled cause, conceiving himself aggrieved by the final decree entered on the 23rd day of April, A. D. 1920, in the above-entitled cause, does hereby appeal from said decree to the Supreme Court of the United States, and he prays, that this, his appeal, may be allowed, and that the transcript of the record, together with the assignments of error and proceedings and papers upon which the said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 24th day of April, in the year of our Lord one thousand nine hundred and twenty.

JOHN E. KINNANE,
United States Attorney,
Eastern District of Michigan, Defendant.

Filed April 24, 1920.

ELMER W. VOORHEIS,
Clerk.
By CARRIE DAVISON,
Deputy Clerk.

53 *Order allowing appeal.*

Now, on to wit, this 24th day of April, in the year of our Lord one thousand nine hundred and twenty, it is ordered, that the appeal in the above-entitled cause be and the same is allowed as prayed for, and that the defendant be not required to file any bond on such appeal, he being a public official.

ARTHUR J. TUTTLE,
United States District Judge.

Filed April 24, 1920.

ELMER W. VOORHEIS,
Clerk.

54 The Supreme Court of the United States, Washington, D. C.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To Detroit Creamery Company, Belle Isle East Side Creamery Company, John Schlaff Creamery Company, State Creamery Company, Towar's Wayne County Creamery, J. H. Wilson & Sons Creamery Company, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, D. C., on the 24th day of May next, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Eastern District of Michigan, wherein John E. Kinnane, United States attorney, is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglas White, Chief Justice of the United States, this twenty-fourth day of April, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America the one hundred and forty-fourth.

ARTHUR J. TUTTLE,
United States District Judge.

Due and timely service of the within citation is hereby accepted this 3rd day of May, 1920.

LEO M. BUTZEL,
D. B. HAYES,
Attorneys for Appellees.

55 United States of America. In the District Court of the United States for the Eastern District of Michigan, Southern Division, in equity.

DETROIT CREAMERY COMPANY ET AL., COMPLAINANTS,
vs.
JOHN E. KINNANE ET AL., DEFENDANTS. } No. 331.

Designation.

And now comes the above-named defendant, John E. Kinnane, United States attorney for the Eastern District of Michigan, and designates the following papers as those which will constitute the record on appeal in the above-entitled cause:

Bill of complaint.
Answer of defendant John E. Kinnane to bill of complaint.
Answer of Wm. F. Connolly, defendant, to bill of complaint.
Memorandum of opinion upon application for restraining order.
Restraining order.
Stipulation by counsel waiving proofs.
Memorandum of opinion on final decree.
Final decree.
Permanent injunction.
Assignments of error.
Claim of appeal by defendant John E. Kinnane.
Order allowing appeal.
Citation.

JOHN E. KINNANE,
United States Attorney.

Filed April 24, 1920.

ELMER W. VOORHEIS,
Clerk.

56 United States of America. In the District Court of the United States for the Eastern District of Michigan, in equity.

DETROIT CREAMERY COMPANY, BELLE ISLE EAST SIDE Creamery Company, John Schlaff Creamery Company, State Creamery Company, Towar's Wayne County Creamery, J. H. Wilson & Sons Creamery Company,
vs.
JOHN E. KINNANE, WILLIAM F. CONNOLLY, FRED H. Diehl, W. William Brogan, Frances E. Burns, C. A. Clark, W. J. Cusick, and A. E. Sarvis. } No. 331.

EASTERN DISTRICT OF MICHIGAN, *ss:*

I, Elmer W. Voorhies, clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify and return to the claim of appeal of John E. Kinnane, United States

attorney, et al in the above entitled cause; that it is a true copy of the record and proceedings in said cause, as the same appear of record and on file in my office; that I have compared the same with the originals, and it is a true and correct transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this eighteenth day of May, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America the one hundred and forty-fourth.

[SEAL.] ELMER W. VOORHIES,
Clerk.

(Indorsement on cover:) File No. 27,733. E. Michigan, D. C. U. S. Term No. 376. John E. Kinnane, United States Attorney for the Eastern District of Michigan, appellant, vs. Detroit Creamery Company et al. Filed June 3d, 1920. File No. 27,733.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

JOHN E. KINNANE, UNITED STATES ATTORNEY for the Eastern District of Michigan, Appellant,
v.
DETROIT CREAMERY COMPANY, ET AL. } No. 376.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
v.
BEN B. SWARTZ. } No. 377.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
v.
JACOB M. SMITH. } No. 378.

MOTION TO ADVANCE.

In each of these cases the sole question involved is the constitutionality of section 2 of the act of October 22, 1919 (41 Stat., 1st sess., c. 80, p. 297), making it unlawful for any person, among other things, "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." This is the same question which is involved in the cases of *United States* v. *L. Cohen Grocery Company*, No. 324; *Harry A. Tedrow* v. *A. T. Lewis & Son*

Dry Goods Company, No. 357, and *R. E. Kennington* v. *A. Mitchell Palmer*, No. 367, all of which have been advanced and set for hearing on October 11, 1920.

The Solicitor General, on behalf of the United States and also of opposing counsel, moves that these causes be likewise advanced and set for hearing on October 11.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

SEPTEMBER, 1920.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

JOHN E. KINNANE, UNITED STATES ATTORNEY for the Eastern District of Michigan, Appellant,
v.
DETROIT CREAMERY COMPANY ET AL. } No. 376.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF FOR APPELLANT.

This is an appeal by the United States from a decree of the District Court enjoining a United States district attorney from prosecuting the appellees on the charge of violating section 2 of the act of October 22, 1919 (41 Stat., 1st sess., c. 80, p. 297), which makes it unlawful for any person "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." The injunction was granted upon the ground that the section of the act in question was unconstitutional.

The questions presented by the appeal are identical with those presented in the cases of *United States* v. *L. Cohen Grocery Company*, No. 324; *Harry A. Tedrow*

v. *A. T. Lewis & Son Dry Goods Company*, No. 357; and *R. E. Kennington* v. *A. Mitchell Palmer*, No. 367, which will be heard and considered by the court contemporaneously with this case. The Government's argument in support of the constitutionality of the law has been fully set out in the briefs filed in those cases, which are now referred to, and need not be repeated.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

SEPTEMBER, 1920.

○

OCT 15 1920
JAMES D. MAHER,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 376.

JOHN E. KINNANE, United States Attorney for the Eastern District of Michigan,

Appellant,

against

DETROIT CREAMERY COMPANY, et al.,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Michigan.

BRIEF FOR APPELLEES.

STEVENSON, CARPENTER, BUTZEL & BACKUS,
Attorneys for Appellees,

CHARLES E. HUGHES,
WILLIAM L. CARPENTER,
Of Counsel.

B. H. TYRREL, PRINTER, 306-6 FULTON STREET, NEW YORK.

In the

Supreme Court of the United States.

October Term, 1920.

No. 376.

John E. Kinnane, United States Attorney for the Eastern District of Michigan,
Appellant,

vs.

Detroit Creamery Company, *et al.*,
Appellees.

Appeal From the District Court of the United States for the Eastern District of Michigan.

BRIEF FOR APPELLEES.

Statement of the Case.

This is an appeal from a decree of the United States District Court for the Eastern District of Michigan which enjoined the appellant, the United

States Attorney for that district, from prosecuting the appellees, or any of them, under certain provisions of Section 4 of the Lever Act, so-called, as amended, being the Act of Congress of August 10, 1917, (40 Stat., 276), as amended by the Act of Congress approved October 22, 1919, (41 Stat. 297). (Transcript, pp. 30-32).

A proper statement of this case is made in the opinion of the District Judge, which reads in part as follows:

> "The sole question involved in this case is whether the provision of section four of the food control act, also known as the Lever Act, being the act of Congress of August 10, 1917, chapter 53, 40 Statutes at Large, 276, as amended by section two of the act of October 22, 1919, making it unlawful for any person, among other things, 'to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries' is constitutional.
>
> "Plaintiffs filed their bill of complaint herein, alleging that they were engaged in the business of purchasing milk from producers thereof and preparing the same for the market and for resale distribution to the consumers thereof within the City of Detroit and adjacent territory; that the price of milk for the past several years in Detroit has been established between the producer and the distributor by the Detroit Milk Commission, 'a body composed of men who, by reason of continuing investigation and contact with the conditions properly entering into a reasonable price for the retail and wholesale sale of milk, have become practical experts;' that under the price schedule fixed from time to time by said commission the rights of the said producers and distributors on the one hand and of the public on the other had been properly protected and that the price of milk per

quart for sale at retail to the public had been prescribed for the month of March, 1920, at sixteen cents per quart, based on a certain price to the producers as set forth in the bill; that the defendants other than John E. Kinnane (the latter being United States attorney for this district) claimed that they composed a body designated as a 'Federal fair price commission,' appointed under authority of the so-called Lever Act hereinbefore mentioned, and as such had attempted to prescribe a schedule for the sale of milk at retail to commence April 15, 1920, at fourteen cents per quart; that said defendants did not hold any legal office, and that their action in attempting to prescribe such rate was void and of no effect; that the defendant, Kinnane, was the United States district attorney, as aforesaid, and as such had stated publicly that he would cause to be prosecuted any person failing to comply with the price schedule so prescribed by the so-called fair price commission mentioned, as a violation of the said Lever Act; that plaintiffs had in their employ upwards of five hundred milk salesmen selling their milk at retail to householders and consumers daily and that the fines capable of being levied or claimed rightfully to be levied on one day's transactions against such salesmen would aggregate millions of dollars; that plaintiffs had in their retail milk business large numbers of vehicles of various kinds, representing many thousands of dollars; that by reason of the aforesaid threats of the defendants against plaintiffs, said milk salesmen would not continue to deliver milk at lawful prices and as a result of the claimed and usurped authority of the defendants, unless restrained, the business of the plaintiffs would be irreparably injured and destroyed; that in so far as said act undertook to make it unlawful for any person 'to make any unjust or unreasonable rate or charge in handling or

dealing in or with any necessaries' it did not legally create any crime under the United States constitution, particularly the sixth amendment thereto, for the reason that such alleged crime was expressed in such vague, indefinite, and uncertain manner, without any reasonably certain standard, as to be a violation of the rights of citizens of the United States, such as the plaintiffs; that the threatened criminal prosecution referred to would involve the plaintiffs in contractual difficulties and litigation over existing contracts for the supplying of milk to them, would result in the destruction of their established business and would operate to deprive the plaintiffs of their property without due process of law, in violation of said constitution and that they were entitled to come into this court to enforce their Federal rights thus threatened; that the defendants were claiming to act under order of the said Lever Act, but as such act is void it affords them no justification and renders them liable to be enjoined from inflicting upon plaintiffs the wrongs complained of, and that the plaintiffs had no adequate remedy at law and this court had sole jurisdiction of the subject matter of their grievance; that the said defendants other than the said Kinnane acted capriciously and without affording the plaintiffs any real opportunity to be heard and without any proper examination or investigation into the facts, and that the price fixed by such so-called Federal fair price commission was confiscatory and illegal. Plaintiffs further challenge the constitutionality of said Lever Act on the grounds that it was vague, indefinite and uncertain; that it fixed no immutable standard of guilt but left such standard to the variance of the different courts and juries which might be called upon to enforce it; that it did not inform those accused of its violation of the nature of the accusation against them nor as to what acts

would constitute such violation; that it failed to define a crime, but in essence merely declared that any person who should commit any unjust or unreasonable act should be guilty of a felony; and that if enforced it would deprive citizens of the United States of their property and liberty without due or any process of law. Plaintiffs prayed that the defendants be enjoined temporarily and permanently from attempting to enforce the schedule of rates complained of, from interfering with the free conduct of their business by commencement of criminal proceedings or otherwise, and from harrassing or oppressing them in the premises. The bill concluded with a prayer for general relief.

"An answer was filed by the district attorney in which he alleged that he and the other defendants constituted a body designated as the Federal fair price committee, having been legally so appointed by the Attorney General of the United States; that as district attorney he approved of the judgment of said committee in its aforesaid action; that he had not made any statement or reached any determination as to any method of procedure against the plaintiffs for selling milk at excessive prices, but that it was probable that prosecution would be based on the provisions of said Lever Act providing punishment for monopolizing or attempting to monopolize the milk supply of the City of Detroit or for conspiring to limit the facilities for supplying milk to said city, or to restrict said supply or the distribution thereof in order to enhance the price thereof; that the arrangements under which the producers and distributers, including the plaintiffs, supplied milk to said city deprived the latter, in an arbitrary and unreasonable manner, of its natural supply thereof and restricted the free sale of milk to the people of said city; that the plaintiffs were making huge profits in handling and distributing milk in

said city and that a number of them had paid stock dividends and large cash dividends derived from the very large margin which they made per quart for distributing said milk; that the retail charge made by plaintiff for delivering milk to consumers was excessive and unreasonable and that a reduction in such price if borne entirely by the distributers of milk, including the plaintiffs, would not unfairly reduce their profits or injure their business; that the said Lever Act as amended was not unconstitutional as charged in the bill; that compliance with the prices fixed by said fair price committee would not involve the plaintiffs in litigation over existing contracts for supplying milk; that such prices were not confiscatory or unfair and would not cause irreparable injury to plaintiffs; that such prices were not fixed capriciously, but after a full hearing to the milk producers and distributors; that no ground exists for an injunction against him as United States attorney, as his right to act in his official capacity in accordance with his judgment can not properly be restrained by this court, but that any question arising under the law involved can be readily tested by proper action in proceedings brought for the enforcement thereof and that the relief prayed should be denied and the bill of complaint dismissed.

"An intervening petition was filed by the Michigan Milk Producers' Association, alleging that it was composed principally of farmers and dairymen throughout the State of Michigan who were engaged in the business of selling and delivering milk to the plaintiffs and that such association was under contracts with the plaintiffs for the sale of such milk, all of which was produced by the members of said association upon their farms to be distributed and sold within said City of Detroit and vicinity. Petitioner alleged that by virtue of said contracts it claimed an interest in this

suit and that as it would be vitally affected by the outcome of such suit it prayed for permission to intervene as a codefendant therein and to file a separate answer in order to protect its interests. In such answer as afterwards filed, said petitioner admitted the material allegations in the bill and practically joined with the plaintiffs seeking the same relief and on the same grounds prayed by them.

"On the hearing of the application for temporary injunction, the defendants, including the district attorney, conceded that the Federal fair price commission, also referred to as the Federal fair price committee, referred to in the pleadings, had no official standing or authority to fix rates or charges which were binding upon anyone, but was limited in its functions to informal investigations into conditions surrounding the making of prices for the commodities mentioned in the Lever Act and to advising, in an unofficial capacity, the district attorney in connection with such prices.

"On such hearing this court granted such applications as against the district attorney and issued such temporary injunction pending the final hearing on bill and answer, restraining said district attorney 'until the further order of the court, from enforcing or attempting to enforce any criminal proceedings against the plaintiffs or anyone of them for violation of section four of the Lever Act on the charge of making an unjust or unreasonable rate or charge in handling or dealing in or with any necessaries.' In view of the concession just mentioned in regard to the status of the other defendants, they were not made parties to said injunction.

"The parties hereto have now filed a stipulation setting forth that 'in view of the decision of the court in this cause on April 20, 1920, which granted a temporary restraining

order or injunction against the United States attorney for the Eastern District of Michigan, defendant herein, restraining him from prosecuting the complainants, or any of them, under a certain provision of Section 4 of the Lever Act, so-called, as amended; and holding and deciding that the provision of Section 4 of the aforesaid act of Congress, as amended, in so far as it declares it to be unlawful to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries, or to exact excessive prices for necessaries, is unconstitutional and void; and said decision being controlling and decisive in the case, and based entirely upon the law, it is therefore considered unnecessary to take proofs in this cause for the reasons aforesaid, the aforesaid question of law being controlling and decisive; it is therefore stipulated and agreed as aforesaid, that the case proceed to a final hearing without the taking of proofs, and that the taking of proofs herein be dispensed with." (Transcript, pp. 24-28).

ARGUMENT.

The fundamental questions relating to the constitutional validity of the statute have been so fully presented in the brief for the appellees in the case of *Harry B. Tedrow, as United States District Attorney, appellant,* v. *The A. T. Lewis & Son Dry Goods Company, et al.,* on appeal from the District Court of the United States for the District of Colorado (No. 357 of this Term), and the brief for the plaintiffs in error in the case of *Weed's, Inc., and Gurdon H. Smith* v. *United States,* in error to the District Court of the United

States for the Northern District of New York (No. 558 of this Term), that it is unnecessary to review the argument in this case.

We present the following points:

FIRST: The statute at the time of its enactment and attempted enforcement, was not a valid exercise of the war power. It was not competent for Congress on October 22, 1919, (when the amended statute was enacted), or at the times mentioned in the bill of complaint, to regulate the prices of retail sales in wholly intrastate transactions.

Our argument in support of this point is fully stated in the brief for plaintiffs in error in *Weed's, Inc., and Gurdon H. Smith* v. *United States*, No. 558, Point Second, pages 17-27, and in the brief for appellees in *Tedrow* v. *The A. T. Lewis & Son Dry Goods Company, et al.*, No. 357, Points I and II, pages 19-103.

What is there said need not here be repeated, but is referred to and adopted in this case.

SECOND: The statute does not validly define a criminal offense and by reason of its uncertainty is invalid under the Fifth and Sixth Amendments to the Federal Constitution.

Our argument in support of this point is fully stated in the brief for appellees in *Tedrow* v. *The A. T. Lewis & Son Dry Goods Company, et al.*, No. 357, Points III, IV, VI, VIII, pages 103-148, 162-172, and 181-188; and in the brief for plaintiffs

in error in *Weed's Inc., and Gurdon H. Smith* v. *United States*, No. 558, Point Fifth, pages 54-68.

What is there said need not be here repeated, but is referred to and adopted in this case.

THIRD: The statute in question is arbitrary class legislation in violation of the Federal Constitution.

The argument in support of this point is fully stated in the brief for appellees in *Tedrow* v. *The A. T. Lewis & Son Dry Goods Company, et al.*, No. 357, Point V, pages 148-161, and in the brief for plaintiffs in error in *Weed's, Inc., and Gurdon H. Smith* v. *United States*, Point Sixth, pages 68-82.

What is there said need not here be repeated, but is referred to and adopted in this case.

FOURTH: The Court below had jurisdiction to enjoin the enforcement of the statute as threatened by the Appellant.

It is well settled that a Court of Equity has jurisdiction to enjoin the threatened enforcement of an unconstitutional statute, where it is shown, as it is in this case, that irreparable injury to property rights will result.

Davis v. *Los Angeles*, 189 U. S. 207, 218;
Dobbins v. *Los Angeles*, 195 U. S. 223, 241;
Ex parte Young, 209 U. S. 123, 159;
Philadelphia Company v. *Stimson*, 223 U. S. 605;
Truax v. *Raich*, 239 U. S. 33;
Hammer v. *Dagenhart*, 247 U. S. 251.

In the case of *Ruppert* v. *Caffey*, 251 U. S. 264, while there was a division in this court, the majority suggested no difficulty as to the jurisdiction of equity and four of the justices were in favor of sustaining the appeal upon its merits.

As the appellant, until restrained by injunction, was proceeding under a construction of the statute, which, as we view it, would make it clearly unconstitutional, this case is brought directly within the rule of those above cited.

The question is not of injury to good name and reputation through a threatened indictment. It goes far deeper than that. As Mr. Justice Holmes said in *International Harvester Company* v. *Kentucky*, 234 U. S. 216, 223: "If business is to go on, men must * * * sell their wares." To compel them to guess with respect to what they may properly charge for their wares under threatened indictment is to put business under a ban and invade property rights.

We may supplement the above summary statement of our points by quoting the opinion of the District Judge in this case. After the statement of the case, above quoted, the opinion proceeds as follows:

> "The only question, therefore, now involved is whether the provisions of section four of this Lever Act as amended to the effect that 'it is hereby made unlawful for any person * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' is constitutional.
>
> "The sixth amendment to the Federal Constitution provides that 'in all criminal prosecutions the accused shall enjoy the right * * *

to be informed of the nature and cause of the accusation.' It seems clear that an indictment which, following the language of this statute, charged a person with merely having made an 'unjust' or 'unreasonable' rate or charge in handling or dealing in or with any necessaries would be wholly insufficient to inform such person of the nature and cause of the accusation thus made.

"Such an indictment, however, could not specify the offense thus charged with any more detail for the reason that the statute purporting to create such offense does not state the facts, acts or conduct necessary to constitute the crime denounced. What is an unjust rate or an unreasonable charge? In determining this question, what elements are to be taken into consideration? What is the test or standard or basis which is to be used in attempting to ascertain whether this statute has been violated? The statute itself furnishes no assistance in the way of answering this question. Is the reasonableness or justice of a rate to be determined by the amount of profit derived therefrom? If so, what percentage of profit from the business of selling a certain article makes the rate or charge in handling or dealing in that article unreasonable and therefore unlawful and criminal? If such profit is derived from a business devoted to the sale of several kinds of articles, how is the portion of such profit properly chargeable to each of such articles to be determined so that the person engaging in such business may know whether or not he is a criminal? What elements enter into the question whether any particular charge is just or unjust, reasonable or unreasonable? What relation to the reasonableness of a rate have the cost of labor, the cost of machinery and of raw material, the cost of overhead charges, and the other expenses of production? How is the amount properly chargeable to these

expenses to be fixed and ascertained? To what extent are differences in market conditions in different places to be considered? Is the existence or absence of competition to be taken into account? Is any allowance to be made for losses and misfortunes which affect costs and profits? To whom must a rate or charge be unjust, to be 'unjust' within the meaning of this statute? Is it the effect which a rate or charge has upon the seller or which it has on the purchaser which renders it reasonable or unreasonable? These and other questions which readily suggest themselves naturally and perhaps necessarily enter into a consideration of the nature of the proper test or standard by which the criminality of any act under this statute must be determined. To the statute itself we look in vain for answers to any of such questions. It furnishes no means for the guidance of courts, juries, or defendants in determining when or how the statute has been violated. No standard or test of guilt has been fixed. We are left to the uncontrolled and necessarily conjectural judgment, or rather conclusion, of each particular jury, or perhaps, court, before which the accused in any given case may be on trial for his liberty. Making, as it does, the question of guilt dependent upon this mere conclusion, or opinion, of the court or jury as to whether the rate or charge involved be just or unjust, reasonable or unreasonable, I cannot avoid the conclusion that this statute is too vague, indefinite, and uncertain to satisfy constitutional requirements or to constitute due process of law. *United States* v. *Brewer*, 139 U. S. 278, 35 L. Ed. 190; *Louisville & Nashville R. R. Co.* v. *Railroad Commission of Tennessee*, 19 Fed. 679; *Tozer* v. *United States*, 52 Fed. 917; *Hocking Valley Ry. Co.* v. *United States*, 210 Fed. 735; *United States* v. *L. Cohen Grocer Co.* (recent unreported decision of the United States Dis-

trict Court for Eastern District of Missouri); *United States* v. *Capital Traction Company*, 34 App. D. C. 592; *Louisville & Nashville R. R. Co.* v. *Commonwealth*, 99 Ky. 132, 35 S. W. 129.

"It is, of course, extremely unfortunate that in enacting this statute Congress should have neglected to observe the constitutional guaranties applicable, but this court can not amend the statute, either by judicial construction or otherwise, but can only interpret and apply it in accordance with rules of law. Any argument based upon what may be thought to be the practical effect of proper judicial construction must be addressed to the only tribunal which made or can make this statute or any other statute deemed by it necessary to carry out the purposes for which it passed this unconstitutional law. There can be no doubt of the power of this court to enjoin the defendant, although occupying the official position which he does, from attempting to enforce an unconstitutional criminal statute against the plaintiffs, in excess of his lawful authority and to their threatened and resultant irreparable injury, as alleged in the bill of complaint herein. *Philadelphia Co.* vs. *Stimson*, 223 U. S. 605, 56 L. Ed. 570; *William Cramp & Sons Ship & Engine Building Co.* vs. *International Curtis Marine Turbine Co.*, 246 U. S. 28, 62 L. Ed. 560.

"The commencement of various criminal prosecutions based upon alleged violation of the statutory provision here involved clearly indicates the intention of the defendant district attorney to attempt the enforcement of this particular provision of the statute, and shows beyond doubt the propriety and necessity of the injunction sought. Plaintiffs, however, are not required to wait until criminal prosecutions are actually brought against them, before invoking the equitable relief to

which they are entitled under the circumstances. *Vicksburg Water Works Co.* vs. *Vicksburg*, 185 U. S. 65, 46 L. Ed. 808; *Waite* vs. *Macy*, 246 U. S. 606, 62 L. Ed. 892.

"In view of some of the allegations in the answer, it may not be amiss to make it entirely plain, if it is not already, that the only portion of this statute involved, construed, or considered here is the provision therein prohibiting the making of an 'unjust or unreasonable rate or charge in handling or dealing in or with necessaries.' No opinion is expressed concerning the meaning, scope, or effect of any other portions of such statute.

"A decree will be entered making the temporary injunction permanent against the defendant Kinnane and dismissing the bill as to the other defendants" (Transcript, pp. 28-30).

We respectfully submit that the reasoning of the learned District Judge above quoted is correct.

We also call the attention of the Court to the opinion of District Judge Thompson for the Eastern District of Pennsylvania in *Lambors* vs. *McAvoy*, 265 Fed. 944. In this opinion Judge Thompson quotes from the opinion of this Court in *Nash* vs. *United States*, 229 U. S. 376, written by Mr. Justice Holmes, (which it was contended is an authority for the proposition that the portion of the Lever Act under discussion is constitutional), and then he says:

"I do not construe the language of Mr. Justice Holmes to mean that a crime may be predicated alone upon the reasonableness or unreasonableness of a man's conduct as found by a jury, but that, where a criminal statute deals with an offense known to the common law, such as monopoly, restraint of trade, and

kindred offenses, or, for example, those based upon common law offenses based upon causing the death of another, or, broadly speaking, any common law offense taken up by a statute, then, where questions of degree must be determined to establish criminality, the fact that they must necessarily be determined by a jury does not render the statute unconstitutional and void.

"The present statute, however, leaves it open to the jury to determine whether it is unreasonable or unjust to make the rate or charge for necessaries, depending upon any number of undefined circumstances which may enter into the transaction. It leaves it uncertain, for instance, whether a man may lawfully base the price of his commodity upon a profit over the original price he paid for the identical article sold, whether he may lawfully make a price based upon general market conditions, whether he may make a profit based upon the average cost of a number of similar purchases, whether his selling price may be based upon the cost he would have to incur to replace the merchandise, and in general the jury may speculate as to any line of conduct, whether it would or would not justify a rate or charge, in determining whether it was unjust or unreasonable."

We also call attention to *United States* vs. *Armstrong*, 265 Fed. 683, a decision made by District Judge Anderson of Indiana, in which he held that Section 4 of the Lever Act was unconstitutional because of the provision therein making the section inapplicable to farmers and others; as an arbitrary and unconstitutional classification under

the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

The decree below should be affirmed.

Respectfully submitted,
STEVENSON, CARPENTER, BUTZEL & BACKUS,
Attorneys for Appellees.

CHARLES E. HUGHES,
WILLIAM L. CARPENTER,
Of Counsel.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 377.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

BEN B. SWARTZ.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED JUNE 3, 1921.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

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THE NORTHERN DISTRICT OF CALIFORNIA.

1 *Indictment.*

United States for America. In the District Court of the United States for the Eastern District of Michigan, Southern Division.

Of the March Term, A. D. 1920.

EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, *ss.*

The grand jurors of the United States of America empaneled and sworn to inquire in and for the body of the southern division of the Eastern District of Michigan, upon their oaths present: That heretofore, to wit: On the thirteenth day of April, in the year of our Lord one thousand nine hundred and twenty, at the city of Detroit in the southern division of the Eastern District of Michigan and within the jurisdiction of this honorable court, one Ben B. Schwartz, late of the city of Detroit aforesaid, did unlawfully, wilfully, and knowingly make and exact an unjust and unreasonable rate and charge for handling and dealing in, and dealing with a certain quantity of food, to wit, potatoes, hereinafter more specifically mentioned, said potatoes being a necessary within the meaning of the act of Congress approved August 10, 1917, as amended October 22, 1919, and entitled "An act to provide further for the national security and defense by encouraging production, conserving the supply, and controlling the distribution of food products and fuel," by then and there making and charging for a certain quantity of food, to wit, one 150-pound bag of potatoes the price of fourteen dollars ($14) per bag, which said price was exacted from and charged to a certain firm, to wit,

2 Hollow Brothers, 369 Michigan Avenue, Detroit, Michigan, which said firm purchased the said potatoes from the said Ben B. Schwartz at the time and place aforesaid; said price of fourteen dollars ($14) per bag covering and containing an unjust and unreasonable rate or charge for the handling, dealing in and dealing with the said necessary, to wit: potatoes, in violation of the aforesaid act of Congress, which said act of Congress was then and there in full force and effect, the same being a war measure adopted by Congress to provide for conditions existing during the state of war between the United States and Germany, which said state of war between the United States and Germany as defined by said act existed at the time of the sale aforesaid, and still continues to exist, contrary to the form, force, and effect of the act of Congress in such case made and provided and against the peace and dignity of the United States.

JOHN E. KINNANE,
United States Attorney.
WALTER I. MCKENZIE,
Assistant U. S. Attorney,
Eastern District of Michigan.

A true bill,

F. B. BAUER,
Foreman.

Filed this 16th day of April, 1920.

ELMER W. VOORHEIS, *Clerk.*

3 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

Be it remembered that on the 19th day of April, A. D. 1920, in said district, before J. Stanley Hurd, a United States commissioner for the Eastern District of Michigan, duly appointed and qualified to take acknowledgments of bail, etc., in and for said Eastern District, personally appeared Ben B. Schwartz, of Detroit, in said district, and produced as sureties Harry J. Purse and Charles L. Randall, and the said Harry J. Purse and Charles L. Randall jointly and severally acknowledged themselves to owe unto the said United States of America the sum of one thousand ($1,000.00) dollars, good and lawful money of the United States, to be levied of their goods and chattels, lands, and tenements if default be made in the conditions following, to wit:

The condition of this recognizance is such that if the above bounden Ben B. Schwartz shall personally be and appear in the District Court of the United States for the Eastern District of Michigan at the courthouse in Detroit in said Eastern District on Tuesday the 20th day of April, A. D. 1920, at 9 o'clock forenoon of said day, and from day to day and term to term thereafter, to answer to an indictment which may be exhibited and filed in said court by the grand jurors of the United States for the body of Eastern District of Michigan against Ben B. Schwartz and abide such order and determination as said court may make concerning him on said indictment or information, and shall not depart said court without leave thereof, then the above obligation to be void; otherwise to remain in full force and effect.

BEN B. SCHWARTZ.
HARRY J. PURSE.
CHARLES L. RANDALL.

Taken, subscribed, and acknowledged before me this 19th day of April, A. D. 1920.

J. STANLEY HURD,
U. S. Commissioner, Eastern District of Michigan.

CHARLES L. RANDALL, *Oxford, Mich.*
HARRY J. PURSE, *435 West Jefferson.*
BEN B. SCHWARTZ, *371 Russell St.*
LEO M. BUTZEL, *of Counsel.*

EASTERN DISTRICT OF MICHIGAN, *ss:*

Before me, J. Stanley Hurd, a commissioner appointed by the District Court of the United States for the Eastern District of Michigan, personally appeared this day Harry J. Purse and Charles L. Randall, who, being first duly sworn, does, each for himself, depose that he is a resident and freeholder of the Eastern District of Michigan; that he is worth the sum of five thousand and upwards dollars after his debts are paid; that he is seized in his own right of real

estate in the district aforesaid, whose actual and present cash value, free and clear of all incumbrances whatever, amounts to five thousand and upwards dollars; and that the real estate hereinbefore referred to by him is situated in Detroit and described as several lots on east side of Trumbull Ave., constituting entire frontage between Ash and Sycamore owned by said Randall, No. 435 West Jefferson Ave., owned by said Purse, both said parcels being free and clear.

BEN B. SCHWARTZ.
HARRY J. PURSE.
CHARLES L. RANDALL.

Sworn and subscribed before me this 19th day of April, A. D. 1920.

J. STANLEY HURD,
U. S. Commissioner for the Eastern District of Michigan.

Filed April 20th, 1920.

J. STANLEY HURD,
U. S. Commissioner.

(Endorsed:) No. 7001. District Court of the United States for the Eastern District of Michigan. The United States *vs.* Ben B. Schwartz. Final recognizance. Amount of bail, $1,000. Taken, acknowledged, and filed Apr. 20, '20. J. Stanley Hurd, U. S. Commissioner.

4 *Demurrer and motion to quash.*

United States of America. In the district court of the United States for the eastern district of Michigan, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
BEN B. SCHWARTZ, DEFENDANT.

Now comes the above-named defendant, Ben B. Schwartz, solely for the purpose of this motion and demurrer, and for no other purpose whatsoever, and without waiving any of his legal rights in and about the indictment filed herein, and demurs to said indictment and moves to quash the same for the following reasons:

First. Because said indictment is insufficient as a matter of law.

Second. Because said indictment fails to state or show any offense committed by this defendant.

Third. Because said indictment is too vague and uncertain to constitutionally create any offense against the United States.

Fourth. Because said indictment is too vague, uncertain, and indefinite to state an offense against the United States.

Fifth. Because said indictment is so indefinite, uncertain, and vague that it does not inform this defendant of the nature of the offense with which he is charged.

5 Sixth. That said indictment is insufficient in law to state an offense under the statutes of the United States.

Seventh. Because the statute mentioned in said indictment is unconstitutional and void for the reason that it is vague, indefinite, and uncertain.

Eighth. Because the statute mentioned in said indictment, and the section thereof upon which said indictment is based, is unconstitutional and void, in that it fixes no standard of guilt, but leaves such standard to the variance of different courts and juries which may be called upon to act thereunder.

Ninth. Because said purported statute is unconstitutional and void, and the section thereof upon which said indictment is based is unconstitutional and void, in that it does not inform this defendant of the nature and cause of the accusation against him.

Tenth. Because said statute and the section thereof upon which said indictment is based, is unconstitutional and void in that it does not advise this defendant, in advance, as to what acts, if any, would constitute a violation thereof.

Eleventh. Because said statute and the section thereof upon which the indictment mentioned is based, is unconstitutional and void, in that it fails to define a crime or any offense against the United States, but merely declares that any person who shall commit an unjust or unreasonable act shall be deemed guilty of a felony.

Twelfth. Because the statute mentioned in said indictment, and the section thereof upon which said indictment is based, is too vague and uncertain to constitutionally create any offense against the United States, in that it makes the criminality of the act set

6 forth in the indictment depend upon the opinion of the jury at the trial of the cause, as to whether the rate or charge set forth in said indictment was unjust or unreasonable, and sets forth no definite standard or test for the guidance of the jury or this defendant.

Thirteenth. Because the statute mentioned in said indictment, and the section thereof upon which said indictment is based, is unconstitutional and void, in that it deprives this defendant of his property and liberty without due or any process of law.

Wherefore, the said defendant prays that for the foregoing reasons, or some one of them, the said indictment may be quashed, set aside, and held for naught.

ROCKWELL T. GUST,
STEVENSON, CARPENTER, BUTZEL & BACKUS,
Attorneys for Defendant.

Filed April 23, 1920.

ELMER W. VOORHEIS, *Clerk.*

7 *Memorandum opinion on demurrer and motion to quash.*

In the District Court of the United States for the Eastern District of Michigan, Southern Division

UNITED STATES OF AMERICA vs. BEN B. SCHWARTZ.	No. 7001.

Hon. John E. Kinnane, of Bay City, Michigan, United States district attorney.

Mr. Rockwell T. Gust and Messrs. Stevenson, Carpenter, Butzel & Backus, all of Detroit, Michigan, attorneys for defendant.

Memorandum opinion on demurrer and motion to quash.

TUTTLE, District Judge: This cause is now before the court on demurrer and motion to quash an indictment herein. The indictment is based upon the act of Congress approved August 10, 1917, as amended October 22, 1919, the so-called Lever Act. Defendant is charged with violating the provision of section four of said act, prohibiting the making of "any unjust or unreasonable rate or charge for handling or dealing in or with any necessaries," in making a certain sale of potatoes at a time and place, to a person, and at a price, specified in said indictment.

Defendant demurs to and moves to quash the indictment on the grounds that it is too vague, uncertain and indefinite, to state any offense against the United States, or to inform the defendant of the nature of the offense with which he is charged, and that the statute upon which the indictment is based, and the language of which is followed in said indictment, is unconstitutional and void for the same reasons.

8 The sole question, therefore, involved is whether the provision of section four of the Lever Act to the effect that "it is hereby made unlawful for any person * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" is unconstitutional for the reasons thus urged. The same question was considered and decided by this court adversely to the contentions of the Government in the case of Detroit Creamery Company et al. vs. John E. Kinnane et al., in which the bill of complaint was filed the day after the filing of the indictment herein, and in which the opinion and decree on final hearing have been this day filed. That case controls the disposition of the present one, and for the reasons stated in the opinion granting the permanent injunction

therein the present demurrer must be sustained and the motion to quash granted. An order will be entered to that effect.

ARTHUR J. TUTTLE,
District Judge.

DETROIT, MICH., *April 23rd, 1920.*

Filed April 23rd, 1920.

ELMER W. VOORHEIS,
Clerk.

9 *Order sustaining demurrer and granting motion to quash indictment.*

At a session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the district court room in the city of Detroit, in said district, on Friday, the twenty-third day of April, in the year of our Lord one thousand nine hundred and twenty.

Present: The honorable Arthur J. Tuttle, United States district judge.

THE UNITED STATES OF AMERICA
vs.
BEN B. SCHWARTZ. } No. 7091.

On reading and filing the demurrer to and motion to quash the indictment herein, after due deliberation and the court being duly advised in the premises.

It is hereby ordered that said demurrer be, and the same is hereby, sustained, and the said motion to quash said indictment be, and the same is hereby, granted.

ARTHUR J. TUTTLE,
District Judge.

10 United States of America. In the District Court of the United States for the Eastern District of Michigan, Southern Division.

UNITED STATES OF AMERICA
vs.
BEN B. SCHWARTZ. } No. 7091.

Assignments of error.

And now comes the United States of America, by John E. Kinnane, United States attorney for the Eastern District of Michigan, and says that the District Court, who rendered the judgment in the above-entitled cause erred in the following particulars, to wit:

I.

Said District Court erred in holding and deciding that the provision of section 4 of the Lever Act, so called, as amended, being the act of Congress approved August 10, 1917, as amended by act of Congress approved October 22, 1919, which declares it to be unlawful and criminal to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries, or to exact excessive prices for any necessaries, is unconstitutional and void.

II.

Said District Court erred in sustaining the demurrer and granting the motion to quash the indictment, filed in the above entitled cause, charging said defendant, Ben B. Schwartz, with making an unjust and unreasonable charge or rate in handling or dealing in or with necessaries, and exacting excessive prices for necessaries.

III.

11 Said District Court erred in sustaining the demurrer and granting the motion to quash the indictment in this cause on the ground that section 4 of said Lever Act, as amended by the act of Congress approved October 22, 1919, which declares it to be unlawful and criminal to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries, is unconstitutional and void on the ground of vagueness and uncertainty.

IV.

Said District Court erred in sustaining the demurrer and granting the motion to quash the indictment, filed in the above entitled cause, charging said defendant, Ben B. Schwartz, with making an unjust or unreasonable charge or rate in handling or dealing in or with potatoes, in the city of Detroit, and State of Michigan.

V.

Said District Court erred in holding that the provision of said Lever Act as amended by act of Congress approved October 22, 1919, making it unlawful and criminal to make an unjust or unreasonable rate or charge in handling or dealing in or with necessaries, is unconstitutional and void.

VI.

Said District Court erred in failing and refusing to hold and decide that the provision of the said Lever Act, as amended, mentioned and described in assignment of error No. 1 is valid and constitutional.

VII.

Said District Court erred in failing and refusing to dismiss the demurrer and deny the motion to quash filed herein.

JOHN E. KINNANE,
United States Attorney, Eastern District of Michigan.

Filed April 27th, 1920.

ELMER W. VOORHEIS,
Clerk.

12 *Petition for writ of error.*

United States of America. In the District Court of the United States for the Eastern District of Michigan, Southern Division.

UNITED STATES OF AMERICA
vs.
BEN B. SCHWARTZ. } No. 7001.

And now comes the United States of America, by John E. Kinnane, United States attorney for the Eastern District of Michigan, conceiving itself aggrieved by the judgment entered on the 23rd day of April, A. D. 1920, in the above-entitled cause, and showing that in rendering said judgment certain errors were committed to the prejudice of the United States of America as appears in the assignments of error filed in this cause, does hereby appeal to the Supreme Court of the United States.

Wherefore, the United States of America prays that a writ of error may issue on its behalf out of the Supreme Court of the United States for the correction of the errors complained of, and that a transcript of the record, together with the assignments of error and proceedings and papers upon which said judgment was rendered, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 27th day of April, in the year of our Lord one thousand nine hundred and twenty.

JOHN E. KINNANE,
United States Attorney, Eastern District of Michigan.

Filed April 27th, 1920.

ELMER W. VOORHEIS,
Clerk.

13 *Order allowing writ of error.*

United States of America. In the District Court of the United States for the Eastern District of Michigan, Southern Division.

UNITED STATES OF AMERICA
vs.
BEN B. SCHWARTZ. } No. 7001.

At a session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to ad-

journment at the district court room in the city of Detroit, in said district, on Tuesday, the 27th day of April, in the year of our Lord one thousand nine hundred and twenty.

Present: The Honorable Arthur J. Tuttle, United States district judge.

On reading and filing the petition of the United States of America praying for the allowance of a writ of error from the United States Supreme Court to this court, and praying also that a transcript of the record in said cause, duly authenticated, be prepared and sent to said United States Supreme Court, on filing the said petition and assignments of error intended to be urged by said United States of America,

On consideration thereof the court does allow the said writ of error from the United States Supreme Court, and that the said United States of America be not required to file any bond on such appeal.

ARTHUR J. TUTTLE,
United States District Judge.

Filed April 27th, 1920.

ELMER W. VOORHEIS,
Clerk.

14 Supreme Court of the United States, Washington, D. C.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States, to the honorable, the judge of the District Court of the United States for the Eastern District of Michigan, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you or some of you, between The United States of America, plaintiff, and Ben B. Swartz, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at Washington, D. C., on the 25th day of May next, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the twenty-seventh day of April, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America the one hundred and forty-fourth.

[SEAL.] ELMER W. VOORHEIS,
Clerk of the District Court of the United States for the Eastern District of Michigan.

Allowed by—
ARTHUR J. TUTTLE,
United States District Judge.

(Endorsed:) No. 7001. United States of America. United States District Court Eastern District of Michigan, Southern Division. United States of America vs. Ben B. Swartz. Writ of error returnable May 25, 1920.

15 Supreme Court of the United States, Washington, D. C.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:
To Ben B. Swartz, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, D. C., on the 25th day of May next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Michigan, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglas White, Chief Justice of the United States, this 27th day of April, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America the one hundred and forty-fourth.

ARTHUR J. TUTTLE,
United States District Judge.

Due and timely service of the within citation is hereby accepted this 3rd day of May, 1920.

LEO M. BUTZEL,
Attorney for Defendant in Error.

(Endorsed:) No. 7001. United States District Court, Eastern District of Michigan, Southern Division. The United States of America vs. Ben B. Swartz. Citation May 25, 1920.

16 United States of America. In the District Court of the United States for the Eastern District of Michigan, Southern Division.

UNITED STATES OF AMERICA
vs.
BEN B. SCHWARTZ. } No. 7001.

Designation.

And now comes the United States of America, by John E. Kinnane, United States attorney for the Eastern District of Michigan, and designates the following papers as those which will constitute the record on appeal in the above entitled cause:

1. Indictment.
2. Bond.
3. Demurrer to and motion to quash indictment.
4. Memorandum opinion on demurrer and motion to quash.
5. Judgment on demurrer to and motion to quash indictment.
6. Assignments of error.
7. Petition for writ of error.
8. Order allowing writ of error.
9. Writ of error.
10. Citation.

JOHN E. KINNANE,
United States Attorney, Eastern District of Michigan.

Filed April 27th, 1920.

ELMER W. VOORHEIS,
Clerk.

17 United States of America. In the District Court of the United States for the Eastern District of Michigan.

THE UNITED STATES OF AMERICA
vs.
BEN B. SWARTZ. } No. 7001.

EASTERN DISTRICT OF MICHIGAN, *ss:*

I, Elmer W. Voorheis, clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify and return to the writ of error of the United States of America in the above-entitled cause; that it is a true copy of the record and proceedings in said cause as the same appear of record and on file in my office; that I have compared the same with the originals, and it is a true and correct transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district this eighteenth day

of May, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America, the one hundred and forty-fourth.

[SEAL.] ELMER W. VOORHEIS,
Clerk.

(Indorsement on cover:) File No. 27734. E. Michigan, D. C. U. S. Term No. 377. The United States of America, Plaintiff in Error, vs. Ben B. Swartz. Filed June 3d, 1920. File No. 27734.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1920

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
v.
BEN B. SWARTZ.
} No. 377.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF FOR THE UNITED STATES.

By the writ of error in this case the United States seeks to review a judgment of the District Court sustaining a demurrer to an indictment charging an offense under section 2 of the act of October 22, 1919 (41 Stat., 1st sess., c. 80, p. 297), which makes it unlawful for any person "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." The demurrer was sustained upon the ground that this section of the act in question is unconstitutional and void.

The questions presented by the writ of error are identical with those presented in the cases of *United States* v. *L. Cohen Grocery Company*, No. 324; *Harry A. Tedrow* v. *A. T. Lewis & Son Dry Goods Company*, No. 357, and *R. E. Kennington* v. *A. Mitchell Palmer*, No. 367, which will be heard and considered by the

court contemporaneously with this case. The Government's argument in support of the constitutionality of the law has been fully set out in the briefs filed in those cases, which are now referred to and need not be repeated.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

SEPTEMBER, 1920.

○

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FILED
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JAMES D. M

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 377.

UNITED STATES OF AMERICA,
Plaintiff-in-Error,

against

BEN B. SWARTZ,
Defendant-in-Error.

In Error to the District Court of the United States for the Eastern District of Michigan.

BRIEF FOR DEFENDANT-IN-ERROR.

STEVENSON, CARPENTER, BUTZEL & BACKUS,
Attorneys for Defendant-in-Error.

CHARLES E. HUGHES,
WILLIAM L. CARPENTER,
Of Counsel.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1920.

No. 377

UNITED STATES OF AMERICA,
Plaintiff-in-error,

vs.

BEN B. SWARTZ,
Defendant-in-error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF FOR DEFENDANT-IN-ERROR.

Statement of the Case.

This is a writ of error to review an order of the District Court sustaining a demurrer to an indictment charging an offense under the Act of October 22, 1919, c. 80 (41 Stat. 297), amending Section 4 of the Act of August 10, 1917, c. 53, (40 Stat. 276), commonly called the Lever Act.

A proper statement of the case is made in the opinion of the District Judge, which reads as follows:

> "This cause is now before the Court on demurrer and motion to quash an indictment herein. The indictment is based upon the act of Congress approved August 10, 1917, as amended October 22, 1919, the so-called Lever Act. Defendant is charged with violating the provision of section four of said act, prohibiting the making of 'any unjust or unreasonable rate or charge for handling or dealing in or with any necessaries,' in making a certain sale of potatoes at a time and place, to a person, and at a price, specified in said indictment.
>
> "Defendant demurs to and moves to quash the indictment on the grounds that it is too vague, uncertain and indefinite, to state any offense against the United States, or to inform the defendant of the nature of the offense with which he is charged, and that the statute upon which the indictment is based, and the language of which is followed in said indictment, is unconstitutional and void for the same reasons.
>
> "The sole question, therefore, involved is whether the provision of section four of the Lever Act to the effect that 'it is hereby made unlawful for any person * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' is unconstitutional for the reasons thus urged. The same question was considered and decided by this Court adversely to the contentions of the Government in the case of *Detroit Creamery Company, et al.*, vs. *John E. Kinnane, et al.*, in which the bill of complaint was filed the day after the filing of the indictment herein, and in which the opinion and decree on final hearing have been this day filed. That case controls the disposition of the present one, and for the reasons stated

in the opinion granting the permanent injunction therein the present demurrer must be sustained and the motion to quash granted. An order will be entered to that effect" (Transcript, pp. 5 and 6).

ARGUMENT.

The fundamental questions relating to the constitutional validity of the statute have been so fully presented in the brief for the appellees in the case of *Harry B. Tedrow, as United States District Attorney, appellant,* v. *The A. T. Lewis & Son Dry Goods Company, et al.,* on appeal from the District Court of the United States for the District of Colorado (No. 357 of this Term), and in the brief for the plaintiffs-in-error in the case of *Weed's, Inc., and Gurdon H. Smith* v. *United States,* in error to the District Court of the United States for the Northern District of New York (No. 558 of this Term), that it is unnecessary to review the argument in this case.

We present the following points:

FIRST: The statute at the time of its enactment and attempted enforcement, was not a valid exercise of the war power. It was not competent for Congress on October 22, 1919, (when the amended statute was enacted), or at the times mentioned in the Indictment, to regulate the prices of retail sales in wholly intrastate transactions.

Our argument in support of this point is fully stated in the brief for plaintiffs in error in *Weed's Inc., and Gurdon H. Smith* v. *United States,* No.

558, Point Second, pages 17-27, and in the brief for appellees in *Tedrow* v. *The A. T. Lewis & Son Dry Goods Company, et al.*, No. 357, Points I and II, pages 19-103.

What is there said need not here be repeated, but is referred to and adopted in this case.

SECOND: The statute does not validly define a criminal offense and by reason of its uncertainty is invalid under the Fifth and Sixth Amendments to the Federal Constitution.

Our argument in support of this point is fully stated in the brief for appellees in *Tedrow* v. *The A. T. Lewis & Son Dry Goods Company, et al.*, No. 357, Points III, IV, VI, VIII, pages 103-148, 162-172, and 181-188; and in the brief for plaintiffs-in-error in *Weed's, Inc., and Gurdon H. Smith* v. *United States*, No. 558, Point Fifth, pages 54-68.

What is there said need not be here repeated, but is referred to and adopted in this case.

THIRD: The statute in question is arbitrary class legislation in violation of the Federal Constitution.

The argument in support of this point is fully stated in the brief for appellees in *Tedrow* v. *The A. T. Lewis & Son Dry Goods Company, et al.*, No. 357, Point V, pages 148-161, and in the brief for plaintiffs-in-error in *Weed's, Inc., and Gurdon H. Smith* v. *United States*, Point Sixth, pages 68-82.

What is there said need not here be repeated, but is referred to and adopted in this case.

While the argument against the constitutionality of the statute disposes of this case, a word may be said as to the indictment.

FOURTH: The Indictment did not inform the accused "of the nature and cause of the accusation", as required by the Sixth Amendment to the Federal Constitution.

The indictment charges that the defendant "did unlawfully, wilfully, and knowingly make and exact an unjust and unreasonable rate and charge for handling and dealing in, and dealing with a certain quantity of food, to-wit, potatoes * * * by then and there making and charging for a certain quantity of food, to-wit, one 150 pound bag of potatoes the price of Fourteen Dollars ($14) per bag * * * said price of Fourteen Dollars ($14) per bag covering and containing an unjust and unreasonable rate or charge for the handling, dealing in and dealing with the said necessary, to-wit: potatoes, in violation of the aforesaid act of Congress, * * *."

It is shown in the brief for the appellees in *Tedrow* v. *The A. T. Lewis & Son Dry Goods Company, et al.*, No. 357, and the brief for plaintiffs-in-error in *Weed's, Inc., and Gurdon H. Smith* v. *United States*, No. 558, that the provision of Section 4 of the Lever Act, as amended, here in question, is void, being so indefinite and uncertain as not validly to define a crime. The form of the indictment in the present case is a further illustration of the indefiniteness and uncertainty of the statute.

Certainly if the Sixth Amendment is to be any protection to the accused, this indictment does not satisfy its requirements.

In answer to this contention the learned Solicitor General says (Govt. brief in *United States v. L. Cohen Grocery Company*, No. 324, pp. 41, 42):

> "If it is competent for Congress to denounce as an offense an unreasonable and unjust act and leave it to the jury to determine from the evidence whether, as a fact, the transaction complained of is unjust and unreasonable, the indictment in this case gives to the defendant all the notice which the Constitution requires or which could properly be given. The real objection in this case is that the Act of Congress is itself too vague and uncertain to admit of enforcement. We therefore pass to a consideration of that question."

We respectfully submit that by thus stating the matter the learned Solicitor General has avoided a consideration of the constitutional objection. We respectfully contend that the indictment in this case is so vague and uncertain that it fails to inform the accused "of the nature and cause of the accusation."

We call attention to the language of Mr. Chief Justice Marshall in his celebrated opinion in *United States v. Burr*, 25 Fed Cas., No. 14693, p. 176:

> "The 8th Amendment of the Constitution (obviously he meant the 6th) has been pressed with great force, * * *. The accused cannot be said 'to be informed of the nature and cause of the accusation' unless the indictment give him that notice which may reasonably suggest to him the point on which the accusation turns, so that he may know the course to be pursued in his defense."

The indictment in the present case gave the defendant no such notice.

The order of the District Court should be affirmed.

Respectfully submitted,
STEVENSON, CARPENTER, BUTZEL & BACKUS,
Attorneys for Defendant-in-error.

CHARLES E. HUGHES,
WILLIAM L. CARPENTER,
Of Counsel.

CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 378.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

JACOB M. SMITH.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED JUNE 8, 1920.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 378.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

JACOB M. SMITH.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

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1 *Indictment.*

United States of America. In the District Court of the United States for the Eastern District of Michigan, Southern Division.

Of the March term, A. D. 1920.

EASTERN DISTRICT OF MICHIGAN,
Southern Division, ss:

The grand jurors of the United States of America empaneled and sworn to inquire in and for the body of the Southern Division of the Eastern District of Michigan, upon their oaths present: That heretofore, to wit, on the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, at the city of Detroit, county of Wayne, in the Southern Division of the Eastern District of Michigan and within the jurisdiction of this honorable court, one Jacob M. Smith, late of the city of Detroit aforesaid, did unlawfully, wilfully, and knowingly make and exact an unjust and unreasonable rate and charge for handling and dealing in, and dealing with a certain quantity of food, to wit, potatoes, hereinafter more specifically mentioned, said potatoes being a necessary within the meaning of the act of Congress approved August 10, 1917, as amended October 22, 1919, and entitled "An act to provide further for the national security and defense by encouraging production, conserving the supply, and controlling the distribution of food products and fuel," by then and there making and charging for a certain quantity of food, to wit, five 150-pound bags of potatoes the price of eleven dollars and fifty cents ($11.50) per bag, which said
2 price was exacted from and charged to a certain person, to wit, one Gordon, whose first name and address is to these grand jurors unknown, which said person purchased the said potatoes from the said Jacob M. Smith at the time and place aforesaid, said price of eleven dollars and fifty cents ($11.50) per bag covering and containing an unjust and unreasonable rate or charge for the handling, dealing in, and dealing with the said necessary, to wit, potatoes, in violation of the aforesaid act of Congress, which said act of Congress was then and there in full force and effect, the same being a war measure adopted by Congress to provide for conditions existing during the state of war between the United States and Germany, which said state of war between the United States and Germany, as defined by said act, existed at the time of the sale aforesaid, and still continues to exist, contrary to the form, force and effect of the act of Congress in such case made and provided and against the peace and dignity of the United States.

Second count.

And the grand jurors aforesaid upon their like oaths do further present: That heretofore, to wit, on the eighth day of April, A. D.

1920, at the city of Detroit, county of Wayne, in the Southern Division of the Eastern District of Michigan and within the jurisdiction of this honorable court, said Jacob M. Smith, late of the city of Detroit, aforesaid, did unlawfully, wilfully, and knowingly make and exact an unjust and unreasonable rate and charge for handling and dealing in, and dealing with a certain quantity of food, to wit, potatoes, hereinafter more specifically mentioned, said potatoes being a necessary within the meaning of the act of Congress approved August 10, 1917, as amended October 22, 1919, and entitled
3 "An act to provide further for the national security and defence by encouraging production, conserving the supply, and controlling the distribution of food products and fuel," by then and there making and charging for a certain quantity of food, to wit, ten 150-pound bags of potatoes the price of eleven dollars ($11.00) per bag, which said price was exacted from and charged to a certain person, to wit, one Ladue, whose first name and address is to these grand jurors unknown, which said person purchased the said potatoes from the said Jacob M. Smith at the time and place aforesaid; said price of eleven dollars ($11.00) per bag covering and containing an unjust and unreasonable rate and charge for the handling, dealing in, and dealing with the said necessary, to wit, potatoes, in violation of the aforesaid act of Congress, which said act of Congress was then and there in full force and effect, the same being a war measure adopted by Congress to provide for condition existing during the state of war between the United States and Germany, which said state of war between the United States and Germany as defined by said act, existed at the time of the sale aforesaid and still continues to exist, contrary to the form, force, and effect of the act of Congress in such case made and provided and against the peace and dignity of the United States.

Third count.

And the grand jurors aforesaid, upon their like oaths, do further present: That heretofore, to wit, on the eighth day of April, A. D. 1920, at the city of Detroit, county of Wayne in the Southern Division of the Eastern District of Michigan and within the jurisdiction of this Honorable Court, said Jacob M. Smith, late of the city of
Detroit aforesaid, did unlawfully, wilfully, and knowingly
4 make and exact an unjust and unreasonable rate and charge for handling and dealing in, and dealing with a certain quantity of food, to wit, potatoes hereinafter more specifically mentioned, said potatoes being a necessary within the meaning of the act of Congress approved August 10, 1917, as amended October 22, 1919, and entitled "An act to provide further for the national security and defense by encouraging production, conserving the supply, and controlling the distribution of food products and fuel," by then and there making and charging for a certain quantity of food, to wit, twelve 150-pound bags of potatoes the price of eleven dollars ($11.00)

per bag, which said price was exacted from and charged to a certain person, to wit, one Orlando, whose first name and address is to these grand jurors unknown, which said person purchased the said potatoes from the said Jacob M. Smith at the time and place aforesaid; said price of eleven dollars per bag covering and containing an unjust and unreasonable rate and charge for the handling, dealing in, and dealing with the said necessary, to wit, potatoes, in violation of the aforesaid act of Congress, which said act of Congress was then and there in full force and effect, the same being a war measure adopted by Congress to provide for conditions existing during the state of war between the United States and Germany, which said state of war between the United States and Germany as defined by said act, existed at the time of the sale aforesaid and still continues to exist: Contrary to the form, force, and effect of the act of Congress in such case made and provided and against the peace and dignity of the United States.

JOHN E. KINNANE,
United States Attorney.

WALTER I. MCKENZIE,
Assistant U. S. Attorney, Eastern District of Michigan.

A true bill.

F. B. BAUER, *Foreman.*

Filed this 16th day of April, A. D. 1920.

ELMER W. VOORHEIS, *Clerk.*

5 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

Be it remembered, that on the 19th day of April A. D. 1920 in said district, before J. Stanley Hurd, a United States commissioner for the Eastern District of Michigan, duly appointed and qualified to take acknowledgments of bail, etc., in and for said Eastern District, personally appeared Jacob M. Smith of Detroit in said district, and produced as sureties Harry J. Purse and Charles L. Randall and the said Harry J. Purse and Charles L. Randall jointly and severally acknowledged themselves to owe unto the said United States of America the sum of one thousand ($1,000.00) dollars, good and lawful money of the United States, to be levied of their goods and chattels, lands and tenements, if default be made in the conditions following, to wit:

The condition of this recognizance is such, that if the above bounden Jacob M. Smith shall personally be and appear in the District Court of the United States for the Eastern District of Michigan at the courthouse in Detroit in said Eastern District, on Tuesday the 20th day of April, A. D. 1920, at 9 o'clock forenoon of said day, and from day to day, and term to term thereafter, to answer to any indictment which may be exhibited and filed in said court by the grand jurors of the United States for the body of Eastern District of Michigan against Jacob M. Smith and abide such order and de-

termination as said court may make concerning him on said indictment or information, and shall not depart said court without leave thereof, then the above obligation to be void, otherwise to remain in full force and effect.

JACOB M. SMITH.
HARRY J. PURSE.
CHARLES L. RANDALL.

Taken, subscribed and acknowledged before me, this 19th day of April A. D. 1920.

J. STANLEY HURD,
U. S. Commissioner Eastern District of Michigan.

CHARLES L. RANDALL, *Oxford, Michigan.*
HARRY J. PURSE, *435 West Jefferson.*
JACOB M. SMITH, *106 West Warren.*
LEO M. BUTZEL,
Counsel.

5½ EASTERN DISTRICT OF MICHIGAN, *ss:*

Before me, J. Stanley Hurd, a commissioner appointed by the District Court of the United States for the Eastern District of Michigan personally appeared this day Harry J. Purse and Charles L. Randall who, being first duly sworn, does, each for himself, depose that he is a resident and freeholder of the Eastern District of Michigan, that he is worth the sum of five thousand and upwards dollars after his debts are paid; that he is seized, in his own right, of real estate in the district aforesaid, whose actual and present cash value, free and clear of all incumbrances whatever, amounts to five thousand and upwards dollars; and that the real estate hereinbefore referred to by him is situated in Detroit and described as several lots on east side of Trumbull Avenue constituting entire frontage between Ash and Sycamore owned by said Randall, No. 435 West Jefferson Avenue owned by said Purse, both said parcels being free and clear.

HARRY J. PURSE.
CHARLES L. RANDALL.

Sworn and subscribed before me, this 19th day of April, A. D. 1920.

J. STANLEY HURD,
U. S. Commissioner for the Eastern District of Michigan.

Taken, acknowledged and filed April 20, 1920.

J. STANLEY HURD, *U. S. Commissioner.*

(Endorsed:) No. 7004. District Court of the United States for the Eastern District of Michigan. The United States vs. Jacob M. Smith. Final recognizance. Amount of bail, $1,000. Taken, acknowledged and filed April 20, 1920. J. Stanley Hurd, U. S. Commissioner.

6 *Demurrer and motion to quash.*

United States of America. In the District Court of the United States for the Eastern District of Michigan, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JACOB M. SMITH, DEFENDANT.

Now comes the above-named defendant, Jacob M. Smith, solely for the purpose of this motion and demurrer, and for no other purpose whatsoever, and without waiving any of his legal rights in and about the indictment filed herein, and demurs to said indictment and moves to quash the same for the following reasons:

First. Because said indictment is insufficient as a matter of law.

Second. Because said indictment fails to state or show any offense committed by this defendant.

Third. Because said indictment is too vague and uncertain to constitutionally create any offense against the United States.

Fourth. Because said indictment is too vague, uncertain and indefinite to state an offense against the United States.

Fifth. Because said indictment is so indefinite, uncertain and vague that it does not inform this defendant of the nature of the offense with which he is charged.

7 Sixth. That said indictment is insufficient in law to state an offense under the statutes of the United States.

Seventh. Because the statute mentioned in said indictment is unconstitutional and void for the reason that it is vague, indefinite, and uncertain.

Eighth. Because the statute mentioned in said indictment, and the section thereof upon which said indictment is based, is unconstitutional and void, in that it fixes no standard of guilt, but leaves such standard to the variance of different courts and juries which may be called upon to act thereunder.

Ninth. Because said purported statute is unconstitutional and void, and the section thereof upon which said indictment is based is unconstitutional and void, in that it does not inform this defendant of the nature and cause of the accusation against him.

Tenth. Because said statute and the section thereof upon which said indictment is based, is unconstitutional and void in that it does not advise this defendant, in advance, as to what acts, if any, would constitute a violation thereof.

Eleventh. Because said statute and the section thereof upon which the indictment mentioned is based is unconstitutional and void, in that it fails to define a crime or any offense against the United States, but merely declares that any person who shall commit an unjust or unreasonable act shall be deemed guilty of a felony.

Twelfth. Because the statute mentioned in said indictment, and the section thereof upon which said indictment is based, is too vague

and uncertain to constitutionally create any offense against the United States, in that it makes the criminality of the act set
8 forth in the indictment depend upon the opinion of the jury at the trial of the cause, as to whether the rate or charge set forth in said indictment was unjust or unreasonable, and sets forth no definite standard or test for the guidance of the jury or this defendant.

Thirteenth. Because the statute mentioned in said indictment, and the section thereof upon which said indictment is based, is unconstitutional and void, in that it deprives this defendant of his property and liberty without due or any process of law.

Wherefore, the said defendant prays that for the foregoing reasons, or some one of them, the said indictment may be quashed, set aside, and held for naught.

ROCKWELL T. GUST.

STEVENSON, CARPENTER, BUTZEL & BACKUS,
Attys. for Def.

Filed April 23, 1920.

ELMER W. VOORHEIS, *Clerk.*

9 In the District Court of the United States for the Eastern District of Michigan, Southern Division.

UNITED STATES OF AMERICA
vs.
JACOB M. SMITH. } No. 7004.

Honorable John E. Kinnane, of Bay City, Michigan, United States district attorney.

Mr. Rockwell T. Gust, and Messrs. Stevenson, Carpenter, Butzel & Backus, all of Detroit, Michigan, attorneys for defendant.

Memorandum opinion on demurrer and motion to quash.

TUTTLE, District Judge: This case is in all essential respects the same as that of United States vs. Ben B. Schwartz, now pending in this court, No. 7001, and for the reasons mentioned in the opinion filed this day in that case, the demurrer to and motion to quash the indictment herein must be sustained and granted, respectively, and an order entered to that effect.

ARTHUR J. TUTTLE,
District Judge.

DETROIT, MICHIGAN, *April 23rd, 1920.*

Filed April 23, 1920.

ELMER W. VOORHEIS,
Clerk.

10 *Order sustaining demurrer and granting motion to quash.*

At a session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to ad-

journment at the district court room in the city of Detroit, in said district, on Friday, the 23rd day of April, in the year of our Lord one thousand nine hundred and twenty.

Present, the Honorable Arthur J. Tuttle, district judge.

UNITED STATES OF AMERICA
vs.
JACOB M. SMITH. } No. 7094.

On reading and filing the demurrer to, and motion to quash, the indictment herein, after due deliberation and the court being duly advised in the premises,

It is hereby ordered that said demurrer be, and the same is, hereby sustained and the said motion to quash said indictment be, and the same is, hereby granted.

ARTHUR J. TUTTLE,
District Judge.

Filed April 23, 1920.

ELMER W. VOORHEIS,
Clerk.

11 United States of America. In the District Court of the United States for the Eastern District of Michigan, Southern Division.

UNITED STATES OF AMERICA
vs.
JACOB M. SMITH. } No. 7094.

Assignments of error.

And now comes the United States of America, by John E. Kinnane, United States attorney for the Eastern District of Michigan, and says that the District Court, who rendered the judgment in the above-entitled cause, erred in the following particulars, to wit:

I.

Said District Court erred in holding and deciding that the provision of section 4 of the Lever Act, so called, as amended, being the act of Congress approved August 10, 1917, as amended by the act of Congress approved October 22, 1919, which declares it to be unlawful and criminal to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries, or to exact excessive prices for any necessaries, is unconstitutional and void.

II.

Said District Court erred in sustaining the demurrer and granting the motion to quash the indictment filed in the above-entitled cause,

charging said defendant, Jacob M. Smith, with making an unjust or unreasonable charge or rate in handling or dealing in or with necessaries, and exacting excessive prices for necessaries.

III.

12 Said District Court erred in sustaining the demurrer and granting the motion to quash the indictment in this cause, on the ground that section 4 of said Lever Act, as amended by the act of Congress approved October 22, 1919, which declares it to be unlawful and criminal to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries, is unconstitutional and void on the ground of vagueness and uncertainty.

IV.

Said District Court erred in sustaining the demurrer and granting the motion to quash the indictment filed in the above-entitled cause, charging said defendant, Jacob M. Smith, with making an unjust and unreasonable charge or rate in handling or dealing in or with potatoes in the city of Detroit and State of Michigan.

V.

Said District Court erred in holding that the provision of said Lever Act, as amended by act of Congress approved October 22, 1919, making it unlawful and criminal to make an unjust or unreasonable rate or charge in handling or dealing in or with necessaries, is unconstitutional and void.

VI.

Said District Court erred in failing and refusing to hold and decide that the provision of the said Lever Act, as amended, mentioned and described in assignment of error No. 1, is valid and constitutional.

VII.

Said District Court erred in failing and refusing to dismiss the demurrer and deny the motion to quash filed herein.

JOHN E. KINNANE,
United States Attorney, Eastern District of Michigan.

Filed April 27th, 1920.

ELMER W. VOORHEIS,
Clerk.

13 *Petition for writ of error.*

United States of America. In the District Court of the United States for the Eastern District of Michigan, Southern Division.

UNITED STATES OF AMERICA,
vs.
JACOB M. SMITH. } No. 7004.

And now comes the United States of America, by John E. Kinnane, United States attorney for the Eastern District of Michigan, conceiving itself aggrieved by the judgment entered on the 23rd day of April, A. D. 1920, in the above entitled cause, and showing that in rendering said judgment certain errors were committed to the prejudice of the United States of America as appears in the assignments of error filed in this cause, does hereby appeal to the Supreme Court of the United States.

Wherefore, the United States of America, prays that a writ of error may issue on its behalf out of the Supreme Court of the United States for the correction of the errors complained of, and that a transcript of the record, together with the assignments of error and proceedings and papers upon which said judgment was rendered, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 27th day of April, in the year of our Lord one thousand nine hundred and twenty.

JOHN E. KINNANE,
United States Attorney, Eastern District of Michigan.

Filed April 27th, 1920.

ELMER W. VOORHEIS,
Clerk.

14 *Order allowing writ of error.*

United States of America. In the District Court of the United States for the Eastern District of Michigan, Southern Division.

UNITED STATES OF AMERICA,
vs.
JACOB M. SMITH. } No. 7004.

At a session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the district court room in the city of Detroit, in said district, on Tuesday, the 27th day of April, in the year of our Lord one thousand nine hundred and twenty.

Present: The Honorable Arthur J. Tuttle, United States District judge.

On reading and filing the petition of the United States of America, praying for the allowance of a writ of error from the United States

Supreme Court, to this court, and praying also that a transcript of the record in said cause, duly authenticated, be prepared and sent to said United States Supreme Court, on filing the said petition and assignments of error intended to be urged by said United States of America.

On consideration thereof, the court does allow the said writ of error from the United States Supreme Court, and that the said United States of America be not required to file any bond on such appeal.

ARTHUR J. TUTTLE,
United States District Judge.

Filed April 27th, 1920.

ELMER W. VOORHEIS,
Clerk.

15 Supreme Court of the United States, Washington, D. C.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States to the honorable, the judge of the District Court of the United States for the Eastern District of Michigan, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you or some of you, between the United States of America, plaintiff, and Jacob M. Smith, defendant, a manifest error hath happened, to the great damage of the said plaintiff as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly, and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, Washington, D. C., together with this writ, so that you have the same at Washington, D. C., on the 25th day of May next, in the said United States Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the twenty-seventh day of April in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America the one hundred and forty-fourth.

[SEAL.]

ELMER W. VOORHEIS,
Clerk of the District Court of the United States, for the Eastern District of Michigan.

Allowed by—
ARTHUR J. TUTTLE,
United States District Judge.

(Endorsed:) No. 7004. United States District Court, Eastern District of Michigan, Southern Division. The United States of America vs. Jacob M. Smith. Writ of error, returnable May 25, 1920.

16 *Citation.*

Supreme Court of the United States, Washington, D. C.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To Jacob M. Smith, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, D. C., on the 25th day of May next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Michigan, wherein the United States of America is plantiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglas White, Chief Justice of the United States, this 27th day of April, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America the one hundred and forty-fourth.

ARTHUR J. TUTTLE,
United States District Judge.

Due and timely service of the within citation is hereby accepted this 3rd day of May, 1920.

LEO M. BUTEL,
Attorney for Defendant in Error.

(Endorsed:) No. 7004. United States District Court, Eastern District of Michigan, Southern Division. The United States of America vs. Jacob M. Smith. Citation returnable May 25, 1920.

17 United States of America. In the District Court of the United States for the Eastern District of Michigan, Southern Division.

UNITED STATES OF AMERICA
vs.
JACOB M. SMITH. } No. 7004.

Designation.

And now comes the United States of America, by John E. Kinnane, United States attorney for the Eastern District of Michigan,

and designates the following papers as those which will constitute the record on appeal in the above entitled cause:

1. Indictment.
2. Bond.
3. Demurrer to and motion to quash indictment.
4. Memorandum opinion on demurrer and motion to quash.
5. Judgment on demurrer to and motion to quash indictment.
6. Assignments of error.
7. Petition for writ of error.
8. Order allowing writ of error.
9. Writ of error.
10. Citation.

JOHN E. KINNANE,
United States Attorney, Eastern District of Michigan.

Filed April 27th, 1920.

ELMER W. VOORHEIS, *Clerk.*

18 United States of America. In the District Court of the United States for the Eastern District of Michigan.

UNITED STATES OF AMERICA
vs.
JACOB M. SMITH. } No. 7004.

EASTERN DISTRICT OF MICHIGAN, *ss:*

I, Elmer W. Voorheis, clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify and return to the writ of error of the United States of America in the above entitled cause; that it is a true copy of the record and proceedings in said cause, as the same appear of record and on file in my office; that I have compared the same with the originals, and it is a true and correct transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this eighteenth day of May, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America, the one hundred and forty-fourth.

[SEAL.]

ELMER W. VOORHEIS,
Clerk.

(Endorsement on cover:) File No. 27735. E. Michigan, D. C. U. S. Term No. 378. The United States of America, plaintiff in error, vs. Jacob M. Smith. Filed June 3d, 1920. File No. 27735.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA,
Plaintiff in Error.
v.
JACOB M. SMITH.
} No. 378.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF FOR THE UNITED STATES.

By the writ of error in this case the United States seeks to review a judgment of the District Court sustaining a demurrer to an indictment charging an offense under section 2 of the act of October 22, 1919 (41 Stat., 1st sess., c. 80, p. 297), which makes it unlawful for any person "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." The demurrer was sustained upon the ground that this section of the act in question is unconstitutional and void.

The questions presented by the writ of error are identical with those presented in the cases of *United States* v. *L. Cohen Grocery Company*, No. 324; *Harry A. Tedrow* v. *A. T. Lewis & Son Dry Goods Company*, No. 357, and *R. E. Kennington* v. *A. Mitchell Palmer*,

No. 367, which will be heard and considered by the court contemporaneously with this case. The Government's argument in support of the constitutionality of the law has been fully set out in the briefs filed in those cases, which are now referred to, and need not be repeated.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

SEPTEMBER, 1920.

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JAMES D. MA

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.
No. 378.

UNITED STATES OF AMERICA,
Plaintiff-in-Error,

against

JACOB M. SMITH,
Defendant-in-Error.

In Error to the District Court of the United States for the Eastern District of Michigan.

BRIEF FOR DEFENDANT-IN-ERROR.

STEVENSON, CARPENTER, BUTZEL & BACKUS,
Attorneys for Defendant-in-Error.

CHARLES E. HUGHES,
WILLIAM L. CARPENTER,
Of Counsel.

B. H. Tyrrel, Printer, 206-8 Fulton Street, New York.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1920.

No. 378.

UNITED STATES OF AMERICA,
Plaintiff-in-error,

vs.

JACOB M. SMITH,
Defendant-in-error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF FOR DEFENDANT-IN-ERROR.

This is a writ of error to review an order of the District Court sustaining a demurrer to an indictment charging an offense under the Act of October 22, 1919, c. 80 (41 Stat. 297), amending Section 4 of the Act of August 10, 1917, c. 53 (40 Stat. 276), commonly called the Lever Act, on the ground of its unconstitutionality.

The indictment and proceedings are substantially similar to those in *United States of America* v. *Ben B. Swartz*, No. 377, which will be heard and considered by this Court contemporaneously with this case. We refer to the brief for the defendant-in-error in that case, and adopt the same in this.

The order of the District Court should be affirmed.

Respectfully submitted,
STEVENSON, CARPENTER, BUTZEL & BACKUS,
Attorneys for Defendant-in-error.

CHARLES E. HUGHES,
WILLIAM L. CARPENTER,
Of Counsel.

KINNANE, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF MICHIGAN, *v.* DETROIT CREAMERY COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

UNITED STATES *v.* SWARTZ.

UNITED STATES *v.* SMITH.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

Nos. 376-378. Argued October 19, 20, 1920.—Decided February 28, 1921.

Decided on the authority of *United States* v. *Cohen Grocery Co.*, *ante*, 81.

264 Fed. Rep. 845, affirmed.

THESE were direct appeals from the District Court involving the validity of part of the Food Control Act. The first was from a decree enjoining the United States Attorney from prosecuting dealers in milk. The other two were from judgments quashing indictments based upon sales of potatoes.

The Solicitor General for appellant in No. 376 and for the United States in Nos. 377 and 378.

Mr. Charles E. Hughes, with whom *Mr. William L. Carpenter* was on the briefs, for appellees in No. 376 and defendants in error in Nos. 377 and 378.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

In the first of the above cases the Creamery Company and others, appellees, filed their bill in the court below

against the United States Attorney and the members of the "Federal Fair Price Committee" for an injunction to restrain prosecutions against them for selling milk at alleged unjust and unreasonable rates or charges, in violation of the fourth section of the Lever Act, as re-enacted in 1919, on the ground, among others, that the section was repugnant to the Constitution because of its vagueness and because it failed to provide a standard of criminality.

The United States Attorney, after challenging in his answer the right to restrain the performance by him of his official duties, admitted that in its advisory capacity the said price committee had fixed what it had deemed to be a fair price for the sale of milk and that he intended, in the discharge of his official duty, to act upon such advice as the basis for prosecutions where such price was exceeded, and, asserting the constitutionality of the section and the want of merit in the grounds upon which it was assailed, prayed the dismissal of the bill.

A temporary injunction issued and, the case having been submitted on the pleadings without proof, the court, stating that the sole question involved was whether the provision in question of § 4 of the Lever Act was constitutional, decided that it was not, because of its vagueness and uncertainty and of the consequent absence from it of all standard of criminality. The enforcement of said provision was therefore permanently enjoined, and upon this appeal, the sole issue raised by the Government is whether the court erred in holding the provision of the statute in question to be void for repugnancy to the Constitution. That it did not so err, is fully established by the opinion this day announced in the *Cohen Grocery Co. Case*, No. 324, *ante*, 81, and therefore it is our duty to affirm.

The two other cases, Nos. 377 and 378, are likewise so controlled. Both were indictments for selling potatoes

at prices which were alleged to be unjust and unreasonable in violation of the reënacted fourth section of the Lever Act, and in both cases the indictments were quashed because of the unconstitutionality of the section, upon the grounds stated by the court in the *Creamery Case*, No. 376, and they are both here at the instance of the Government because of alleged reversible error committed in so doing. It follows, for the reasons just stated and those expounded in the *Cohen Grocery Co. Case*, that the action below in all three cases must be and the same is hereby

Affirmed.

MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS concur in the result.

MR. JUSTICE DAY took no part in the consideration or decision of these cases.